(18,583.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 71.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY AND THE PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

CATHARINE LANDRIGAN, ADMINISTRATRIX OF THE ESTATE OF THOMAS J. LANDRIGAN, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

THE BALTIMORE & POTOMAC RAILROAD COMPANY ET AL., Appellants,
vs.
CATHERINE LANDRIGAN, Administratrix, &c. } No. 1168.

a Supreme Court of the District of Columbia.

CATHARINE LANDRIGAN, Administratrix of the Estate of Thomas J. Landrigan, Deceased, Plaintiff,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY and The Philadelphia, Wilmington & Baltimore Railroad Company, Defendants. } At Law. No. 42828.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed February 25, 1899.

In the Supreme Court of the District of Columbia.

CATHARINE LANDRIGAN, Administratrix of the Estate of Thomas J. Landrigan, Deceased, Plaintiff,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY and The Philadelphia, Wilmington & Baltimore Railroad Company, Defendants. } At Law. No. 42828.

The plaintiff, Catharine Landrigan, to whom letters of administration have been duly issued and granted by the supreme court of the District of Columbia upon the estate of Thomas J. Landrigan, deceased, late of the District of Columbia, sues the defendants, The Baltimore & Potomac Railroad Company and The Philadelphia

Wilmington & Baltimore Railroad Company, bodies corporate, having officers and agents and doing business in the District of Columbia, for that the said defendants, heretofore, to wit, on the 29th day of August, 1898, and for a long time prior thereto, the defendant The Baltimore & Potomac Railroad Company owned, managed, and controlled a certain railroad operated by steam, together with tracks, cars, and locomotive engines; that the said railroad tracks were and are located on certain streets and avenues in the city of Washington, District of Columbia, and intersect and cross certain others; that, among others, said tracks were and are located upon and along what is known as Virginia avenue southwest, and intersect and cross what is known as South Capitol
2 street; that the defendant The Philadelphia, Wilmington & Baltimore Railroad Company also was and is accustomed to operate and use, under lease, license, or permission from the defendant The Baltimore & Potomac Railroad Company, sundry of said tracks, including that on Virginia avenue southwest at its said intersection with said South Capitol street, and it then and there became and was the duty of the said defendants to guard and protect the public from all trains and engines propelled upon said tracks, and properly and securely to fasten and couple together and properly and securely to furnish and equip their said cars with safe and efficient brakes, and to give timely warning and notice of the approach of all engines and cars upon said tracks to all persons desiring to cross said tracks at the intersection of the aforesaid street and avenue, and it then and there became and was the duty of the defendants to keep a diligent and careful lookout upon all moving cars and engines for persons crossing said tracks, and to have and to keep lights on the ends of their said cars when being propelled or moved along said tracks after dark.

Yet the defendants, on, to wit, the 29th day of August, 1898, disregarding their duty in the premises, so carelessly, negligently, and improperly conducted themselves in this behalf that at the time and place aforesaid Thomas J. Landrigan, plaintiff's intestate, while attempting to cross said Virginia avenue southwest at its said intersection with said South Capitol street, upon the public highway in said city, as he had a right to do, was, through the carelessness, negligence, and improper conduct of the defendants, thrown down and run over by a car or cars operated as aforesaid and running backwards upon one of said tracks operated as aforesaid by the defendants, said car or cars
3 being then under the management and control of the defendants' agents, servants, and employees; that the defendants, by their agents, servants, and employees, were, on, to wit, on the day and year last aforesaid, at a late hour at night, shifting or causing to be shifted certain cars, and so negligently, carelessly, and improperly coupled together their said cars, and so negligently, carelessly, and improperly failed to furnish and equip said cars with safe and efficient brakes, and so negligently and carelessly and improperly failed to give any proper notice or warn-

ing of the movement of said cars by having and keeping a light or lights upon the ends of said cars, or by the ringing of bells, or blowing of whistles, or by giving other signs, notices, or warnings, that the said Thomas J. Landrigan while in the act of crossing said railroad tracks, as he had a right to do, and without any want of due or reasonable care on his part, was thrown down and run over and killed by one of said cars, being shifted as aforesaid, breaking loose and running back upon him without any notice or warning of the approach of said car, so running backward upon the said Landrigan as aforesaid; that the said Landrigan, had he not been killed by the said wrongful act, neglect, and default of the said defendants' agents, servants, and employees, as aforesaid, could have maintained an action and have recovered damages for the said wrongful act, neglect, and default as aforesaid; that the plaintiff's intestate left him surviving a widow, a mother, a brother, and a sister, and by reason of the premises and the statute in such case made and provided an action for damages hath accrued to the said plaintiff, to wit, in the sum of ten thousand ($10,000) dollars; therefore the plaintiff sues; and the plaintiff claims of said defendants
4 the sum of ten *dollars* ($10,000) dollars, besides the costs of this action.

J. J. DARLINGTON,
DOUGLASS & DOUGLASS,
JOSEPH D. WRIGHT,
Attorneys for Plaintiff.

Notice to Plead.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

J. J. DARLINGTON.
DOUGLASS & DOUGLASS.
JOSEPH D. WRIGHT.

Plea.

Filed March 16, 1899.

In the Supreme Court of the District of Columbia.

CATHARINE LANDRIGAN, Administratrix of the Estate of Thomas J. Landrigan, Deceased, Plaintiff,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY and The Philadelphia, Wilmington & Baltimore Railroad Company, Defendants.
} At Law. No. 42828.

The defendants, for plea, say that they are not, nor is either of them, guilty as alleged.

F. D. McKENNEY,
Attorney for Defendant.

5 *Memorandum.*

October 24, 1901.—Verdict for plaintiff for $6,500.00.

Supreme Court of the District of Columbia.

FRIDAY, *November* 8, 1901.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

CATHARINE LANDRIGAN, Administratrix of Estate of Thomas J. Landrigan, Deceased, Plaintiff,
vs.
THE BALTIMORE AND POTOMAC RAILROAD Company and The Philadelphia, Wilmington and Baltimore Railroad Company, Defendants. } At Law. No. 42828.

This cause coming on to be heard upon the motion of the defendants for a new trial, it is considered that said motion be, and hereby is, overruled and judgment on verdict ordered; therefore it is considered that the plaintiff recover against the defendants six thousand five hundred dollars ($6,500) for her damages as aforesaid assessed, together with her costs of suit, to be taxed by the clerk, and have execution thereof.

6 *Appeal.*

Filed November 27, 1901.

In the Supreme Court of the District of Columbia.

CATHERINE J. LANDRIGAN, Administratrix of Thomas J. Landrigan, Deceased, Plaintiff,
vs.
THE PHILADELPHIA, WILMINGTON & BALTIMORE Railroad Company and The Baltimore & Potomac Railroad Company, Defendants. } At Law. No. 42828.

And now come the defendants, The Philadelphia, Wilmington & Baltimore Railroad Company and The Baltimore & Potomac Railroad Company, and appeal to the Court of Appeals of the District of Columbia from the judgment rendered against them in the above-entitled cause on November eighth (8), 1901.

F. D. McKENNEY,
Attorney for Defendants.

Citation in this case waived.

DOUGLASS & DOUGLASS.

Memorandum.

November 27, 1901.—Bond on appeal filed.

7 Supreme Court of the District of Columbia.

FRIDAY, *December* 20, 1901.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

CATHERINE LANDRIGAN, Adm'x, Plaintiff,
vs.
THE BALTIMORE & POTOMAC R. R. CO. ET AL., Defendants. } At Law. No. 42828.

Upon motion of the defendant, it is ordered that the time in which to present the bill of exceptions to the court be, and hereby is, extended until the 27th day of December, 1901, inclusive.

* * * * * * *

FRIDAY, *December* 27, 1901.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

CATHARINE LANDRIGAN, Adm'x, Pl'tiff,
vs.
THE BALTIMORE & POTOMAC R. R. ET AL., Def'ts. } At Law. No. 42828.

Now come here again the defendants, by their attorneys, and tender to the court here their bill of exceptions taken during the trial of this case, and pray that the same may be duly signed, sealed, and made part of the record, now for then, which is done accordingly.

8 *Bill of Exceptions.*

Filed December 27, 1901.

In the Supreme Court of the District of Columbia.

CATHARINE LANDRIGAN, Administratrix of Thomas J. Landrigan, Deceased,
vs.
THE BALTIMORE & POTOMAC RAILROAD Company *et al.*, Defendants. } At Law. No. 42828.

Be it remembered that the above-entitled cause came on for trial before Chief Justice Bingham and a jury on October 16, 1901, Messrs. J. J. Darlington, C. A. Douglass, and J. D. Wright appearing on behalf of the plaintiff, and Messrs. F. D. McKenney and J. S. Flannery on behalf of defendants.

And thereupon the plaintiff, to maintain the issues upon her part joined, gave evidence by the following witnesses tending to prove as follows:

CHARLES J. MOTLEY testified that he resided at #318 Third street southeast, Washington, D. C., and had been in the employ of the Philadelphia, Wilmington & Baltimore Railroad Company for nine years; in August, 1898, he was employed by said railroad company as flagman and extra conductor engaged in the shifting operations around the "Jersey yards" of said company; on the night Landrigan was killed he was acting as conductor and was engaged in making up trains; the "Jersey yards" extended from South Capitol street east to New Jersey avenue; the engine yard or round-house yard is also a part of what is called the "Jersey yards;" the round-house is on South
9 Capitol street, south of the South Capitol Street crossing; at this crossing there are four tracks, the farthest to the north, next to the Government reservation, being used for shifting purposes, the two tracks immediately south of it being the north and south bound main tracks, and the most southerly track being what is called the "lead" or "ladder" track; this "ladder" track was used for shifting purposes, for shifting out cars; all the tracks in the "Jersey yard" lead into the "ladder" track; said "ladder" track, from one end of it to the other, runs all the way from F street southwest to I street southeast and crosses South Capitol street; on the night of the accident to Landrigan witness was the yard conductor engaged in making up a train of tourist or passenger cars to go south; he had pulled eight or nine cars out on the "ladder" track, and while these cars were standing upon the "ladder" track the last car broke away, ran down the "ladder" track, which is an ordinary downgrade from the point where the car broke away, towards South Capitol street; at the time the coach broke away it was coming out on the "ladder" track, and the break occurred at a point leading into a switch at a little curve; this coach had been taken from one of the storage tracks and had been brought out on the "ladder" track; witness coupled the coach himself with the assistance of Brakeman Wilhoit and Mr. Hottal, the yardmaster, who was there to give him the signal; the car that broke away was a Pullman, and the car to which it had been coupled was a tourist car; the Pullman had a Janney coupler, and there was a Miller coupler on the tourist car; the Miller and Janney couplers would not couple—they were not made or intended to couple together; one was a little higher than the other, the Janney being the higher of the
10 two, but do not remember whether or not one went over the other; one of the drawheads also was higher than the other; it was a very difficult coupling to make, and a link and pins had to be used to couple the cars together; this difficulty arose from the fact that they were not the same sort of couplers; that he did not know whether the difference in height made them less or more difficult to couple; he coupled the two cars in question by putting a link in the Janney coupler and putting a pin through the hole in that coupler, then laid the link on top of the Miller coupler and put a pin down through it; in both the Janney and Miller couplers there is a slot for a link and also a hole for the pin to go in; he

did not put the link in the slot of the Miller, because he could not get it in there; that he could not explain why he did not do it that way; it was a difficult coupling to make either way; he did not remember whether they tried to do it that way or not; he coupled it the best way he could—the easiest way he could couple it; he did not remember whether the difference in the height of the two couplers had anything to do with causing him to put the link on top of the Miller coupler instead of placing it in the slot of the Miller; he did not remember whether it was on a curve or on a straight track when he coupled the cars together; the pin held the link in position on top of the Miller coupler; the link could not very well go over the top of the pin which held it in place; leading over the switch, the two couplers rubbing together forced the pin up out of the hole, so as to pry it up. If he were coupling two cars together the drawheads of which came together plumb and even, one being as high as the other, and each con-
11 taining a slot for a link and a hole for the insertion of the pin, in coupling them with a link and pin, he would put the link in the slot and not on top of the coupler; on this occasion he laid the link on top of the Miller instead of putting it in the slot, because that was the easiest and best way and the only way he could couple it; the link was too short to put it in the slot of the Miller coupler, but the link was long enough to enable the pin to go down through the hole; where the link is laid on top of the coupler instead of in the slot he does not know what would be the effect upon the rear coach if a slack should take place by the cars coming together; that the coupling which he made was a very ordinary coupling and is made right along; possibly it might hold all right; he had never seen it break loose before; it was customary to couple cars by putting the link on top instead of through the slot; this coupling was caused to break away by the slack running up between the cars when they jolted together—by the Janney and Miller couplers running up together; the rubbing together made the pin raise up and broke it loose; when coaches are properly coupled together they break loose very often in that way; when two cars are properly coupled with the link and a slack is produced causing them to bump together, they come apart sometimes, although this is very rare and it is also very rare that the other coupling comes apart; when the car broke away he yelled to the rest of the crew who were on the rear end of the car; he was standing on the steps of the tourist car on the end next to the Pullman, which broke away; this Pullman car was called the "Lylete;" he does not remember what became of the link or pin after the car broke away; he looked at the "Lylete" and saw the link, but did not look at it particularly; he did not remember the words he used when he called to the
12 crew; the men on the car, Hottal and Wilhoit, did all they could to stop it; he saw these men putting the brake on at the end of the Pullman car next to him, but could not see what they did at the other end; he did not know

whether they left the end next to him for the purpose of putting the brakes on the other end; the car ran a little over a hundred yards probably before it stopped; it was stopped by striking some cars down on the "ladder" track; these cars were loaded with sand and coal, as well as he remembered; the end of this "ladder" track in the neighborhood of South Capitol street was used for shifting purposes and for putting cars or anything there they wanted to store there; he has never seen passenger coaches stored down there because it is not long enough for that; the only cars he ever saw stored there were freight cars. Said witness further testified that he saw Landrigan that night, and when he first saw him he was lying on the ground near to and south of the "ladder" track at South Capitol street; Landrigan was at the side of the "ladder" track, at the intersection of South Capitol street; Mr. Fenton was fixing up his wounds; Landrigan was afterwards carried away in an ambulance and died in a hospital the next morning; at the time witness saw him he looked like he was pretty badly mashed up—looked like he had been run over; that it was about 11.55 p. m. when he saw him; Landrigan lived at 31 or 33 Virginia avenue, on the north side of the railroad tracks; he was a machinist and employed on the night force in the round-house; he had known Landrigan about three years, during all of which time Landrigan had been in the employ of the railroad company. There was a white light in the vestibule of the Pullman car that broke away—in the little dome-shaped arrangement in roof of the car; this
13 was the only light hanging in the vestibule, and there was no light on the platform; the link and pin used in making the coupling were the ordinary link and pin; that two Janney or two Miller couplers will couple together without requiring the use of a link and pin, but a Janney and Miller coupler will not couple of themselves and you have to use a link and pin to couple them; that the Miller and Janney couplers were not intended to couple together.

And thereupon said witness, on cross-examination, further testified that at the southwest crossing of South Capitol street there were four railroad tracks, the first track from the south being the ladder track, the track immediately to the north of it being the north-bound main track, the next track to the north the south-bound main track, and the fourth track or the one on the north side of the crossing being called the reservation track—a freight track; that the ladder track extended west of the crossing to an alley (the witness indicating a point on the map about a square and a half distant), and east of the crossing it extended to K street southeast; the round-house was a little to the south and east of the crossing and there were tracks connecting it with the ladder track; east of the crossing of South Capitol street were the "Jersey yards" of the company, and all of the tracks in that yard connected with the ladder track; that this is why it is called the "lead or ladder track;" the gateman's box at the southwest crossing is at the northeast corner of the crossing, and at the southeast crossing of South Capitol street it is at the southeast corner; on the west side of South Capitol street

there is a pavement leading up to the southwest crossing; there were safety gates on both sides of the railroad track at this
14 crossing, and between the end of the gate on the south side and the tool-house west of the southwest crossing, which is marked on the map, there was a fence, five feet high, which extended up to the gate; that between the ladder track and this fence there is an open or vacant space; between the south rail of the ladder track and this fence or the crossing gates there is a space of about 10 ft.; a person could not walk around the end of the gate and get on the track. Said witness further testified that the ladder track on that night had been in use in their shifting operations from about 7 or 7.30 o'clock; that in these shifting operations they would go all the way down to the crossing at South Capitol street if necessary, but witness did not remember going all the way down there that night; on other nights they had been in the habit of going all the way and crossing South Capitol street when engaged in shifting operations; the ladder track was a track that was used more or less frequently in shifting operations from one end of it to the other; cars were put on the ladder track west of South Capitol street to be unloaded or just to get rid of them for a short while, sometimes; they would put them there so as to have them where they could get hold of the cars handy; they would be put there temporarily during shifting operations. It was not customary to handle passenger cars on that side at the southwest crossing of South Capitol street; witness and his men were freightmen ordinarily, but are called upon now and then to handle passenger cars; on the night of the accident they were handling passenger cars and were making up a train of tourist cars in which to load soldiers to go South; in the shifting operations in the yard in August, 1898, different kinds of cars would be received there—
15 foreign cars belonging to different roads—especially at that time when soldiers were traveling there was a great deal of traffic and they were moving a great many troops; on these cars they would find a great many Miller and Janney couplers; it was more usual to find Miller couplers on foreign cars in August, 1898, than it is today; they are seldom seen now; it was an ordinary occurrence at that time in the yard to couple cars up with Miller and Janney couplers on them; the Miller and Janney couplers are entirely different and will not couple of themselves; they must be coupled by putting a pin in the Janney and another pin in the Miller and connecting the two with a link; this is the ordinary way of coupling two such cars, and the only way that the witness knew to couple them. Witness followed the runaway car down to the crossing after he got rid of the rest of the cars; he reached there about three minutes after the car passed over the crossing; that he forgets whether he noticed the condition of the gates at that time; the crossing was lighted by the street lamps located on each of the four corners, and there was an electric light in the reservation north of the tracks (indicating a point on the map northeast of the intersection of South Capitol street and the railroad tracks) and another one south and

east of the tracks near the signal tower; the lamp in the dome of the vestibule of the Pullman car had a white shade or globe underneath; it gave a bright light—you could see it all right; the lamp was inside of the door and the door was closed; the glass in the door extended about half way down and the light shown through the glass in the door; you could see the light very plainly as you looked at it; the same sort of a light was in both ends of
16 this car. Said witness further testified that if they had not made a link and pin coupling they might have pulled the cars out with a big, heavy chain; a chain is used sometimes when the drawhead is pulled all the way out; where there are two drawheads with a coupler in each drawhead, the ordinary way to couple them is to use a link and pin whenever the couplers are not alike.

And thereupon, on redirect examination, said witness further testified that he supposed, to guess at it, that the car ran probably a hundred yards from the place where it broke away until it hit Landrigan, and then about twenty-five yards after it hit him before it stopped. Said witness further testified that there were two crossings at South Capitol street, the southwest and southeast crossings; the street was divided by parking which ran in the center of it; these two streets or crossings were about 50 ft. apart; Landrigan was killed at the southwest crossing; the railroad tracks where they intersect with South Capitol street are on Virginia avenue. The nearest electric light to the point where Landrigan was killed was on the east side of the southeast crossing and north of the tracks; this light was about 75 yrds. from where Landrigan was struck. There were nine coaches attached to the engine when the car broke away. The car that broke away was the last coach; Hottal, the yardmaster, was present when witness coupled the cars together; that witness told him that he could couple them up the way they were coupled, and Hottal said, "Couple them up some way, and get them out of here;" at that time the crew was waiting for the car on the main track, and they were in a hurry to get it out; he was having some difficulty to get it coupled when he made this remark at Hottal; it is not true that the cars would not couple at all—they would not couple without
17 using a link and pin; the coupling was safe enough to pull the car out of the yard, and that was all that was wanted; it did not do it on that night because it broke loose; nothing extraordinary happened to make it break loose; the Janney coupler was about 2½ inches higher than the Miller, but he did not think that the Janney slid all the way over the Miller when they came together; he did not remember testifying at the former trial of the case that "the Janney went clean over the top of the Miller;" the Janney coupler, the lip of it, would not be over 2½ inches thick, which would pretty nearly take it over; it was about 2½ inches higher than the other, but he does not remember whether it went over it or not; whatever he testified to at the former trial was true; the couplings "slipped around," he supposed, when they were going around the curve, and that had a tendency to make them come apart; that he supposed it was due to the slack caused by coming over the switch on the

ladder track; that the statement made by him at the former trial that he "used a link, put a pin down through the Miller, just a temporary coupling, to pull the car up this track, and put the link over the Miller, put the pin down in the Miller, and stuck a pin through the link, and the pin having a head on it held in that position, held the link in position to pull the car out; but when it got up on the curve the slack ran together, and probably the pin dropped down; the link jumped over, or twisted off the head of the pin—that is as nearly as I can explain it to you about this coupling"—was substantially correct. Said witness further testified that after the car was coupled they pulled it probably 45 or 50 yards, and when it got on the curve formed by the ladder track and the track from which they were bringing it, it broke away;
18 that he knew this curve was there; that he did not remember testifying at the former trial that they could not stop the car because of a "defect in the brake, the brake did not hold," but that it is true that the brake might have hung in some way; the brake did not hold the car, but he does not know what was the matter with it; that he was taking the train of cars in the opposite direction from the point where Landrigan was killed, and intended to give this car to the crew that was waiting for it on the main track; the reason, as well as he remembers it, why he put the link on the top of the Miller coupler was because the Janney was higher than the Miller; they could have used a chain on that night, but did not have any to use when they wanted to get the car out; there were chains in the yard; he does not know whether the chain would have been perfectly safe or not; the car might have broken away by the chain becoming untied, or loose, or breaking, unless it was very strong; that he did not remember examining the pin on the tourist car, but remembered looking at the pin in the Lylete, the Pullman car; this pin was still in the hole in the link, and this satisfied him that the link had pulled over the head of the other pin.

And thereupon said witness, on recross-examination, further testified that the head of the pin would not go through the hole in the link and would hold it in position; that the drawhead was a big piece of iron fastened to the end of the car, and the coupler was attached to the end of the drawhead; when the drawhead is completely pulled out the coupler comes with it; when two cars are in that condition they have to use a chain to keep them together; when the cars have a complete drawhead and coupling attached, no
19 chain is necessary, and they simply used a link and pin coupling when the couplers are not alike; this was the way they did on that night; there was nothing the matter with the drawheads; they were simply different couplers and would not couple; they were getting these cars out to put them on the train that Fenton's engine was attached to; this train, as well as he remembered, was standing on the south-bound main track, facing towards the depot; when he reached the crossing after the accident he found the engine standing there on either the main track or No. 1 track, right close

to the point where Landrigan was found and about 25 yards distant; it was about northwest of the crossing, on the north side of the track, and about 10 yards from the crosssing; that he did not remember exactly the position of the engine—he saw it over there, but did not take particular notice whether it was on the crossing or not.

And thereupon, on re-redirect examination, said witness further testified that Fenton's engine and train were standing nearer the southwest crossing than the southeast crossing; the engine was headed south or towards the depot, and, as well as he remembered, about 10 ft. from the southwest crossing; that he did not remember whether or not it had any box cars attached to it.

And thereupon the plaintiff, further to maintain the issues upon her part joined, read in evidence the testimony of KENNETH D. WILLHOIT, deceased, who testified for the plaintiff at a former trial of the cause. Said witness testified that he had been in the employ of the Philadelphia, Wilmington & Baltimore Railroad Company as brakeman for five years; on the night Landrigan was
20 killed he was acting as flagman in the yard in connection with the yard engine; he did not know Landrigan personally; had seen him a number of times; he saw him after he was hurt; Landrigan's legs were run over, but he could not say whether it was by a car or another train; train No. 78, which left the depot about 11.55 or 11.35, was passing there about the time of the accident; this train No. 78 is known as the midnight express for New York and crossed South Capitol street, where Landrigan was hurt, going in an easterly direction; when witness saw Landrigan the latter was lying on the south side of the outside rail of the "ladder track," the most southerly track of the four tracks at that crossing; there is a tool-house to the west of that crossing, and a fence running along south of the tracks and in front of the tool-house; Landrigan was between this fence and the outside rail of the "ladder" track; immediately before he saw Landrigan lying there the coach "Lylete" passed over the crossing at South Capitol street and witness came right along behind this car, after train 78 passed, to see if the coach had done any damage down there and saw Landrigan lying there with some one around him; he went down where the car had stopped and came back and found out what the trouble was; that Motley was the conductor of the yard engine and Anderson the engineer; he thinks there were five or six coaches attached to the yard engine; that an ordinary passenger coach is 60 or 70 feet long; Hottal, the yardmaster, Motley, and himself made the coupling; one car had a Miller, and the other—the one that broke away—had a Janney coupler; it is impossible to couple a Miller and Janney together; it was on a curve, and therefore they used a link and pin; it was a secure coupling to pull the car around in the yard, but it was not a safe coupling to run over the road; it was sufficient for the yard and was very frequently
21 done; the couplings did not couple exactly because they did not fit; you cannot couple two such couplings to-

gether and have to use a link and pin; the Miller coupler is not as high as the Janney; it is a thinner piece of iron and the drawhead is thinner than that of the Janney; the link was put in the Janney all secure and then laid over the top of the Miller and a pin run through the top of the link and down through the hole in the Miller: there was a place in the Miller coupler for the link to go in, but it was a little lower and it could not be put in there on account of that curve; they coupled the cars right on a curve; the curve swayed the car around and brought the Miller coupler out on the side, like; when the pin was put down through the link and into the hole in the Miller coupler the head of the pin was on top of the link, and the only thing to keep the link from slipping over the head of the pin was the shoulder around the head of the pin; that he supposes it would have been safer if they could have put the link through the regular place for that purpose in the Miller coupler; when they were pulling the car out on the straight track he tried the brake and it appeared to be all right, but when some one hollered that this car had broken off he went to work on it again; it did not seem to catch hold; he dropped off the end of the car and caught the rear end of it—the head end—and at the same time Hottal got on the end that he got off of; the witness called for Wilber to help him to put the brake on and they did all they could to stop the car, but the car had got too much start; the brake seemed to work all right—he did not have any fault to find with the brake, only the car had gotten too much start;
22 he first tried the rear brake and could not get that to work; then went to the other one; while witness and Wilber were working on the forward brake Hottal jumped on and tried to work the rear brake; they did not succeed in stopping the car, because it had gotten too much of a start. He got off at South Capitol street on the southeast side, stood there for a second or two, and then ran after the car to see what damage it had done. There were some other cars down on the end of this track, that this car ran into, and it would not have been safe for the witness to have stayed on the car. He found out that the car had broken loose by some one halloaing (there were five of them around there at the time), but cannot say who it was or from which direction the sound came; the car was running slowly when he started to put on the brake. He jumped off, went to the other end, and when he got there the car was not running very fast. Hottal got on the rear end just as he got off. That he does not know whether or not he said at the coroner's inquest that "he did not think the brake was any good or else it would have stopped the car," nor could he say whether he testified at the inquest that the front brake was loose and was not doing any good. The brake did not do any good, because the car had too much start; Wilber jumped off with him; that you sometimes apply a brake and it does not "take up" right at first; that he could not say whether he noticed any slacking up of the car as a result of putting on the brakes, because he got off, and it was dark, night-time, and he could not see; that he could not say

whether he noticed any slacking up before he got off the car, because the brake had not taken any hold, so far as he knew; both Wilber and himself put the brake on as hard as they could; there was a light on both ends of the coach; there was a light in the coach, but none on the back platform; when he jumped off he did
23 not exactly keep up with the car, but followed it down because 78 was coming at that time and he was afraid the runaway car would knock some of the cars out on the main track, and he followed down to see whether there was any trouble; that he practically kept up with the car, but was a little distance behind it; the car ran across the southeast and southwest sides of South Capitol streets, beyond the point where Landrigan was, and into some flat cars loaded with dirt.

Said witness, on cross-examination, further testified that the Jersey yards consisted of a network of tracks between South Capitol street and New Jersey avenue, south of the main railroad tracks; that what is called the "old Jersey yard" contained tracks from *1* to *11*, and the "new Jersey yard" began with track *4* and ran up to number *9;* that on the other side or east of the Jersey yards was what is called the "engine yard;" the old and new Jersey yards are used for the storage of all passenger cars, sleepers, baggage and box cars, freight cars of all descriptions, and also as a yard to unload coal and to load different freight. There is a fence running from the southeast side of South Capitol street, from the gate-tender's box to the southwest side of South Capitol street, the side next to the tool-house; that at both the southeast and southwest crossings are crossing gates, which come right up to the fence; these gates are double gates, and if they are down it is impossible for anybody to cross the track at either of the crossings at South Capitol street without getting under them; at the southeast crossing they could walk around the end of the gate, but they could not at the southwest crossing; Landrigan was found on the southwest side of the southwest crossing and on the south side of the tracks; this "ladder" track is a
24 straight track, running from one end of the yard to the other; it is also called the "lead" track because all the other tracks in the yard lead into it; if they wanted to get a car out of the other tracks it would be pulled out on this "ladder" track; on this night they were engaged in making up an equipment of cars to carry soldiers South; there were some flat cars, stock cars, coaches, and this sleeper for the officers, he supposed; they were pulling five or six cars out to get this sleeper—the "Lylete"—to put it on the rear of the train, their intention being to shove the remaining cars back into the track from which they got them; that he saw the coupling made, but did not make it himself; when they found cars with the old-fashioned drawhead, and wanted to couple them to a car with a Janney coupler, they used a link and pin, which was the usual coupling when they got cars of that kind; this was done very frequently, but it is not done so much now as formerly because they get more cars with the new equip-

ment; that he did not say the Miller coupler was lower than the Janney, but that it was not as thick as the Janney, which made it apparently lower than the Janney when the cars came together; that they laid the link on top of the Miller because they could not get it into the groove; the top of the pin was holding it in place; the track on which the runaway car was ran parallel with—right by the side of—the track on which No. 78 was coming; he jumped off the "Lylete" on the southeast side of South Capitol street; 78 passed first and then he ran down the north-bound track behind the "Lylete;" that he saw some one was hurt when he went down, but did not stop because, by the light being in the car, he thought perhaps there was a porter or somebody in there, and ran
25 down to see what damage had been done to the car; when he saw nothing serious had happened, he came right on back to see this object; it was not over three minutes—not over two minutes—when he got back. When he got back he saw Mr. Fenton behind, attending to Mr. Landrigan, with his torch. Fenton had started to bind up Landrigan's legs; Fenton's engine was on the opposite side, on the 4th track, on the north side of the south-bound track. It was standing about on South Capitol street, on the south-east side; he does not remember whether it was all the way over the crossing or not; he thought it was. It was just across from where Landrigan was lying, and was partially on the crossing; the gates were down; he first noticed the gates when he came down there after he had jumped off the end of the car; the gates were down then on both sides of the street. He did not notice the gates before 78 passed, because he had not been down that far; he stood on the southeast side of South Capitol street until 78 passed, and then started to run down the main track, and as he ran down the track he noticed that the gates were down on both sides.

Said witness, on cross-examination, further testified that when he reached Landrigan the latter was conscious to a certain stage; he asked Fenton who it was, and Fenton said it was "Tom Landrigan." When he got back where Landrigan was, Hottal, the yardmaster, Mr. Fenton, and Mr. Bright were there, and either Mr. Hottal or Mr. Bright asked Landrigan, "How did this thing happen?" and Landrigan said, "I came under the gates and something struck me, and a whole string of cars ran over me;" that was all witness heard him say. He did not hear him say anything about train No. 78; nothing more was said that he can remember; he saw Lan-
26 drigan put in the ambulance which came up pretty soon after the accident—about as soon as they could get there; the gates were raised when Landrigan was put in the ambulance. Said witness further testified that the lead or ladder track is used all the time, backwards and forwards, on week days especially, and very frequently on Sundays for putting cars in and pulling them out; that the light in the car was in the dome—in the vestibule—just on the outside of the door, over the platform; he knows there was a light in the west end of the car, the end going toward South Capitol street—which was the front end of the car the way it was

moving; this light could be seen more plainly than a lamp; such lights contain two burners, are lighted by oil, and are more brilliant than a lantern; the reflector is over the top of the light; there is a kind of white shade over them. Said witness further testified that between the gate and the first rail of the track south of which Landrigan was found there was a clear space of about 14 or 15 feet; the tool-house set off from the gate about 17 ft., and Landrigan was nearer the tool-house than the gate; he was nearer the track than the gate, but inside of the gate. Said witness further testified that the runaway car passed the southwest crossing of South Capitol street before No. 78 reached there; it struck just the middle part of No. 78 as the train came by there; the runaway car had just about gotten across the crossing when the engine of No. 78 began to cross the crossing; it was almost at the same time.

Thereupon, upon redirect examination, said witness further testified that the light in the vestibule of the car could be seen by people on the ground; it hung down low and did not set right up in the dome; it had a shade over it, but he does not know
27 whether you could call it a reflector or not; it was plain enough to be seen by anybody who was on the ground; that he did not remember stating at the coroner's inquest that "he would expect a coupling like that to give away—that it was an unsafe coupling. Said witness further testified that there were some cars standing on the end of the ladder track; that his track is a blind track down there—it stops right at the end of the property yard; it ran alongside of the property-yard fence and stopped on the southeast side of the F Street crossing.

JOHN F. WEBSTER, a witness for the plaintiff, testified that he lived about 150 yards from the intersection of the railroad tracks at South Capitol street, and had been living there all his life, and before the tracks were put down; that he had had occasion to cross the southwest crossing of South Capitol street and the railroad tracks both in the daytime and night-time; South Capitol street is divided by the reservation in the center of it which is about 50 or 60 feet wide, thus making the two crossings; there are separate safety gates at each of these crossings; witness' house was northwest of the gates; that the gates at the southwest crossing of South Capitol street in the month of August, 1898, and prior thereto, whether trains were passing or not, were generally kept down; that was as a rule; of course he could not say they were down all the time, but as a rule they were down after ordinary bed-time; for a number of years he had occasion to cross the tracks back and forth both day and night because his business required him to go down there; that he has gone along there at 11 or 12 o'clock at night and at all hours of the night, and it
28 was his experience that these gates were always down after ordinary bed-time; that he was running a brick yard, and this caused him to go down there very often at night and to come home at all hours of the night, and he would always find the gates

down, continually; it did not make any difference whether the trains were passing or not; he has stood on the side where Landrigan was killed and crossed right over without hesitating, because he found that was the regular condition of the gates whether a train was passing or not; he did not see any effort made to raise them; he has seen them down at all hours of the night, after half past ten or eleven o'clock up to three or four o'clock in the morning; the gates were down and kept down, he supposed, until daylight; that when coming north at night, as a rule, he would have to get under the gates; that the most southerly of the four tracks at the crossing goes as far as the storage yard of the company extends; that the company has a railroad yard there where they store railroad cars, rails, coal, &c.; the south track extends westerly about 200 ft. beyond the southwest crossing; that he calls it a dead track because it does not lead anywhere, it just stops; the westerly end of this track, from the southeast crossing, is used to put in coal, railroad ties, iron, &c., for the use of the company; that is all it is used for; they put coal in there and unload it, and when they want it for their watch-boxes they haul it around to them; no portion of this track lying west of the southeast crossing is used for shifting or making up trains; that he has lived there all his life and has never seen any shifting or making up of trains at that point; he has seen
two or three flat cars there, or a load of coal or cinders, or a car
29 containing railroad ties or iron rails; that they did not store
their passenger cars there; they took them further east.

And thereupon said witness, on cross-examination, further testified that he had seen the company shifting cars on that ladder track west of the southwest crossing of South Capitol street, but they were cars loaded with coal, lumber, rails, or something for their own special use, and bases this statement upon his observation year in and year out; these cars were left there; that he has seen them shifted in, but could not say that he has seen them pulled out, but he is satisfied that this was done; that it would be necessary to pull them over this crossing in order to get them out; that it would be impossible for him to say that every flat car or box car that was shifted in there contained something directly for the use of the company, but as a rule they contained coal, rails, and such stuff as that, and he assumed that the material contained in the cars belonged to the company because it was put into the company's yard, but as a matter of fact does not know of his own knowledge that the end of that track was used simply for cars containing material belonging to the company. Said witness further testified that up to April, 1893, he was engaged in the brick business south of the tracks, which caused him to cross there night and day; that after April, 1893, and up to the spring of 1898 he had been in the habit of crossing the tracks at this crossing in the night-time on an average of about twice a week; some weeks he might have gone oftener than that; he would return across the tracks as late as twelve to half past one o'clock; since the spring of 1898 he has not paid a great deal of attention to

these crossings because he did not have much occasion to cross
30 there; he has crossed there since that time at night, but not very often; before Landrigan was killed he had occasion to cross there quite often; that he had not crossed there late at night since that time without seeing the gates down, but could not specify any particular time when this occurred; he could not recollect ever attempting to cross the tracks going south and finding the gates down when he did not see a train or shifting engine in sight; going north he has found the gates down and a train, shifting engine, or car moving in the vicinity of that crossing, and sometimes he has crossed there and found the gates down when he did not see any train, car, or engine in the vicinity; he would naturally glance up and down to see whether there was any train, car, or engine there, and naturally he would hesitate a little right on the start; west of the southwest crossing, toward the depot, there is a curve and a car, shifting engine, or train in motion would not be apt to be seen from the outside of the gate until it got around that curve; if there were any cars standing on the end of the ladder track, it would make it more difficult to see a train or engine coming from that direction, and a train standing there would naturally break the view around the curve; he has stood on the south track and seen the midnight train by going north, and in the case of this particular train he knew it was coming because he had gotten on the inside of the gate and could see around the curve and see it coming and would not undertake to cross; naturally he would look both ways before crossing. Said witness further testified that standing at the gate on the south side of the southwest crossing the gateman's box would break the view down this side track to the east if you stood outside of the gate; you could look
31 up the main track, he supposed, to New Jersey avenue, but he thought the watch-box would break your view of the south track to the east to a certain extent if you were standing outside of the gate. This box is 6 or 7 feet square; he could not say that a watch-box 6 feet square would prevent you from seeing a train if it was coming along, but it would break your view to a certain extent in looking up the track; that when you stood on the inside of the gate on the open space you could look straight up the side track to the eastward and there was nothing to break your view; that he has frequently crossed there at night and found the gates down when trains were actually about to pass, and he would see the gates down without any trains there oftener than he would see them there; when the gates were down trains might have been approaching that crossing and he not have seen them, although they must have been a good way off if he did not see them.

Said witness further testified that the tracks of the railroad company at South Capitol street are a portion of the tracks of the Jersey yard of the railroad company; at night these Jersey yards are being used almost continuously for the making up and breaking up of trains and the storage of cars; that he thought it was not a fact that the tracks at the crossing of South Capitol street are almost continuously in use at night for the company's business; that he

lived west of the southwest crossing and they shift cars in front of where he lives, but try to keep between the crossings and keep the crossings clear as much as possible. Said witness further testified that in shifting from the east—the main part of the yard—to the portion of the track which is in front of his house it is necessary to cross the South Capitol Street crossing; that they use the east more than they do the west end of the
32 tracks at this crossing; that every train of cars that is made up in the Jersey yard and goes into the depot, every freight car from the 9th Street freight station, every shifting engine that passes from the Jersey yard to the depot or to the 9th Street freight station, and every engine that comes from the south, the 9th Street freight yard or the 6th Street depot going to the round-house, pass over the South Capitol Street crossing; that aside from shifting, the use of this crossing by empty and loaded cars, empty and loaded engines, and shifting engines is almost continuous in one way or another at pretty much all times of the day and night.

And thereupon said witness, on redirect examination, further testified that he supposed the railroad company owned the material that was unloaded or stored at the end of the yard on that ladder track, because he has seen them haul coal around to the switch-box for the men to use and naturally supposed it was their material; that there is no freight yard there—it is a private yard; that he supposed the company's property goes up as far as the track extends; they used this track in connection with the storage yard of theirs. Said witness further testified that standing outside of the gates on the south side of this crossing two cars loaded with coal or other material on the end of this track would obstruct the view of a train coming from the depot, and you would have to get out on the track if you wanted to look up the track a couple of hundred yards; that the watchman's box indicated on the map was right close to the ladder track, and farther up along that track is the tower-house, which is 25 or 30 feet high; that this would
33 have about the same effect to obstruct the view as the smaller watchman's box; it would not break the view of a train coming, but would obstruct the view, and you would not have a clear view of the track; that you could see one coach looking up there. Said witness further testified that during the month of August, 1898, and subsequent to — he crossed there at night about twice a week, and the condition of the gates after the usual bed-time was about the same; he did not discover any difference in them as compared with what it was before Landrigan was killed. Said witness further testified that he stood on the ladder track on one occasion when the midnight express for New York was passing, and that he considered it a safe place.

Thereupon counsel for the plaintiff, in the course of the argument of an objection to the last preceding testimony of the witness, stated that it was admitted that Landrigan went under the closed safety gates and stood either on or by the side of the ladder track.

Said witness further testified that the shifting in front of his house was generally done on the north track; that they could only go about half way of the block on the south track.

And thereupon said witness, on recross-examination, said that he had passed there prior to the accident when he had approached this crossing during the night and found the gates up and no trains in sight.

ROBERT W. STORY testified that he had been living at South Capitol street and Georgia avenue for about forty years, and in the month of August, 1898, and for a long time previous thereto was engaged in the feed and grocery business on South Capitol
34 street, south of the railroad track; that he was familiar with the southwest crossing of South Capitol street and Virginia avenue, and had been traveling there about 15 or 20 years, both in the daytime and night-time; that sometimes he would pass there three or four times a day, and sometimes maybe only once a week, then again it would be six or seven times of a night and then he might lay off a week; that this practice has continued for the last 15 or 20 years; during this period he had passed there at night and had called the watchman several times to get the gates up; the gates were mostly down all the time when trains were passing; when he was going home somewhere between 12 and 4 o'clock, sometimes the gates would be down and he would have to call to the gateman to get past; that this was so when no trains were passing.

And thereupon, upon cross-examination, said witness further testified that his store was located south of the tracks and most of his business was north of the tracks; he was in the habit of crossing these tracks all the time; he crossed with a wagon ordinarily in the daytime and with a carriage at night; that when he spoke of the gates being down he spoke from his personal knowledge; in crossing in the daytime he found that they put the gates down when trains came along, and when trains were not coming they would put the gates up; in the night-time the most trouble he had with the gates in getting past was afier 12 o'clock; sometimes they would put the gates down and maybe go to sleep or something like that, and he would have to holler to get the gates up in order to pass by; he would not like to say positively how often this has happened, but he could clearly say that it was about a dozen times; it may have been more, but he could clearly say that it was that often; he had frequently come to these gates at night, both before and
35 after 12 o'clock, when no trains were approaching and found the gates up and crossed without any trouble, and he had done this very much more frequently than he had been stopped by the gates being down; that he could not say exactly whether the gates were more frequently up than down at night when no trains were passing; he had just noticed it about a dozen or fifteen times in passing by when he would come from a ball or something like that; he had noticed the gates down and no trains passing and had

to holler for the gateman; this was generally after 12 and up to 3 or 4 o'clock at night; he had very frequently come there after twelve o'clock and found the gates up, and he had found them that way very often; that there were 3 tracks at this crossing which were used very constantly; the south track, he thought, they did not use at all; when engines and cars and trains were passing backwards and forwards over that crossing, the gates went up and down; these gates were in very frequent use both day and night.

And thereupon said witness, on redirect examination, further testified that when he found the gates down on these occasions he halloaed to the watchman at the crossing; he did not exactly say they were asleep, but he had to halloa to them and wait about 5 or 7 minutes to get past. Thereupon said witness, in response to a question whether passing at night he found the gates more often down or more often up, said, "Well, I found them up, you know, but on a few occasions I found them down—12 or 15 times I recollect."

And thereupon, on recross-examination, said witness further testified that he meant, by the last answer, 12 or 15 times in the last ten years mostly; that he always used the west crossing because it was paved; the east crossing was not paved; that he had never
36 made any inquiry of the watchman to find why he did not answer his hail; on one occasion in the morning about two o'clock witness and Dr. Johnson were detained there about 7 or 8 minutes before they could pass; that he has mostly always found the gateman there when he came along.

FRANK C. KAPPEL testified that he was a brother of the plaintiff, Mrs. Landrigan; that in August, 1898, he was employed at the Penna. R. R. Company's round-house; that Landrigan was employed there as a machinist, and was on the night force; that between 12 and 1 o'clock they were allowed one hour for lunch, and Landrigan was in the habit of taking that hour off; Landrigan had been in the employ of the railroad company for about nine years in this same place and had been living on the north side of Virginia avenue ever since witness first knew him; the night Landrigan was killed was not a clear night nor was it a really dark night—there was no moon and there were a few clouds; that the most usual and direct route to Landrigan's house from the round-house was up South Capitol street to the southwest crossing, then right over to the north side of Virginia avenue; this was the way Landrigan usually took; the round-house was between H & I streets on South Capitol street, about 50 ft. from the building line of South Capitol street. Said witness further testified that he saw where Landrigan was picked up after he was hurt; he was a little west of the southwest crossing, in front of the tool-house; he saw blood around there and a little proud flesh right alongside the south track which is called the ladder track; this blood and flesh was on the south side of the ladder track; he saw it on the morning of the accident
37 about half past four o'clock. Landrigan died at the Emergency hospital a little after four o'clock on the morning of the accident.

And thereupon counsel for the defendant admitted that the plaintiff's intestate died from the injuries received at the time in question.

And thereupon said witness further testified that train No. 78 for New York was scheduled to leave the depot at 11.50 or 11.55.

That the place he noticed this blood, &c., was at the southwest crossing, a little west of the crossing; that the distance from the gates to the southernmost rail of the ladder track at that point is about 15 feet; that the portion of the ladder track lying west of the southeast crossing is used for storing gravel cars and unloading coal; when they unloaded it they shoved it down there alongside of the property yard of the railroad company and put it right over the fence; it was never used for shifting or for making up or breaking up trains or for storing passenger cars; the portion of this track east of the tower was used for shifting cars; this portion west of the tower was hardly used at all—just for storing a couple of cars down there; this tower and the yardmaster's office indicated on the map are the same; in August, 1898, when Landrigan was killed, witness was employed at the Penna. R. R. roundhouse, and had been so employed for about 6½ years, and was familiar with the use of those tracks; on the night Landrigan was killed there were two cars, one containing gravel, west of the southwest crossing; with these two cars standing there on the west end of the ladder track a person could not see anything coming from the west if he were standing immediately
38 outside of the south gate; the only way he could see would be by walking out on the track and looking up and down; that standing outside of the gate the flagman's box at the southwest corner of the southeast crossing and the tower beyond would obstruct the view of the ladder track looking east. Said witness further testified that in August, 1898, he was working in the daytime; that he had worked on the night force, but not during the year 1898; that he had occasion to cross the southwest crossing, at night, immediately prior to and about the time of Landrigan's death; that the gates as a general thing, in the night-time, were down; that during the summer of 1898, and for five or six years previously, he had passed over this crossing three or four times a week at all hours of the night up to 1 o'clock, and that after 11 o'clock he generally found the gates down whether trains were passing or approaching or not; after 11 o'clock the gates were generally kept down whether there was a train in sight or not. Said witness further testified that there was an electric light on the north side of the southeast crossing, about 200 ft. from where Landrigan was killed; he had never noticed whether this electric light furnished any light of any consequence at the intersection of South Capitol street S. W.; that if a train were standing on the north track a few feet from the southwest crossing it would have the effect of making it darker at the gates at the southwest crossing. And thereupon said witness further testified that the ladder track west of the southeast crossing is always rusty, and the track that is used for shifting purposes is always bright.

And thereupon said witness, over the objection of counsel for the defendant, was permitted to testify that he and Landrigan
39 used to go home together for two or three months; that they both worked at night at the time; that the gates were down and that they had to crawl underneath the gates to get home; that the gates were generally kept down and they very seldom ever saw the gates up; that the times when Landrigan and the witness crossed were between 12 and 1 o'clock at night and between 6 and 7 o'clock in the morning.

And thereupon said witness, on cross-examination, testified that he had been in the employ of the railroad company for between six and seven years prior to March 1900, excepting a period of about three months, about three years before Landrigan's death; that he "notices" the rust upon the south track pretty nearly every time he passes there; that he noticed it "this morning;" there are four rails there that are bright, two are rusty, and two others are not so rusty; he has noticed this condition ever since he has been crossing there for the last twenty years; this rust was west of the southwest crossing; he did not remember testifying at the former trial about there being rust on the tracks, because he was not asked the question; counsel asked him about the rust "this morning" for the first time; the south track is pretty well rusted—is rusty all the time; he knows two tracks are bright, and the track fartherest north is not as bright as the middle tracks; that he did not know whether or not the center tracks have steel rails and the north and south tracks iron rails, but did know there was a difference in their weight, the rails of the middle or main tracks being heavier; these tracks are more constantly run over and this tends to keep them bright. Said witness further testified that his mother lived north of the tracks, and that he visited her sometimes two or three times a week after he moved south of the tracks; when Lan-
40 drigan was hurt witness was on the day shift; the time he worked on the night shift was for three or four months in the early stages of his employment by the company, and afterwards for three or four months when he returned to the service of the company and 2½ or 3 years before Landrigan's death; that when he crossed the tracks with Landrigan at night they were coming home to lunch between 12 and 1 o'clock. This was about 3 years prior to Landrigan's death; witness did not cross with him while witness was working in the daytime. Said witness further testified that the western end of the south track was used for storing cars and taking cars in and out for the purposes of the property yard; that he has seen these cars lie there two or three weeks after they were unloaded; that they might have taken the cars out immediately after pushing them in, but he did not see them taken out; the two cars that were on this track when Landrigan was killed had been there for two or three days; that he did not know whether or not these cars had been pulled out and put back during these two or three days, but he noticed the number of one of the cars, and the other car looked like the same

car. Said witness further testified that he calls "shifting" moving cars from one track to another, and what they call a shifting track is generally used every day for shifting; that he has hundreds of times seen cars on that south track and knows they were put in and pulled out, but would not call the process of putting them in and pulling them out "shifting;" that when he testified at the former trial that the shifting is very general down there, he meant that they shifted cars down there to load and unload in the property yard; that this track has only an outlet to the east, but in this respect it is similar to every other track
41 in the yard; the only way in differs from them is that it is about 8 or 10 hundred feet from any switch along there; on the east this track communicates with every other track in the yard by a switch, and, with the exception of the two main tracks, every other track in the yard has a blind end to it. Said witness further testified that during the year prior to Landrigan's death he crossed at this point, at night, after 11 o'clock, on an average of about once a week, or a little oftener; that he usually found the gates down whether trains were in sight or not; he has come there after 12 o'clock at night, when no trains were in sight, and found the gates up, but very seldom; he has found them up only when somebody hallooed to the man to raise them up; that after the traffic of the day was over they would put the gates down and keep them down unless somebody asked to have them raised; this crossing at night is not used as much as in the daytime; most of the shifting and switching is done up towards the eastern section of South Capitol street; that every train that comes from the 9th Street freight station or 6th Street depot, going north, and every freight and passenger train coming from the north would have to cross the South Capitol Street crossing; that the shifting engines also cross there very frequently in the night-time; that engines from the round-house would come out on the ladder track, and then be shifted on the track upon which they were to operate, and all detached engines coming to or going from the round-house pass over the South Capitol Street crossing; that between 12 and 4 or 5 o'clock it is not very busy down there at this crossing. And thereupon said witness admitted having testified at the former trial that he "went around to see his mother once or twice a week, and when he passed going to work sometimes, the gates were up
42 and sometimes down and there was no train in sight;" that he always found the gateman there when he was passing at night; when he got there at night and found the gates down he could not see whether there was a train in sight until he got out on the track and looked up and down; that he has found the gates down at night and walked out on the track and found a train or engines approaching or passing; that the watch-box south of the ladder track interfered with the view down that track to the east—the closer you get, the greater the obstruction from this box and the further away the more view you had of that track; that he thought, standing inside of the gates, the watch-box located outside of the

gates and next to the fence south of the track would prevent a person seeing anything up that track; that you would have to get on the track before you could see up there on account of this watch-box, the fence, and the telegraph pole which were there; that west of the southwest crossing, towards F street, there is a curve; that you could not see around that curve until you got on the north side of the crossing; that although you could not see a train coming from that direction until you crossed the tracks you could hear it unless there were two or three trains passing at the same time, or an engine blowing off steam—then you could not hear anything; that he has crossed over at night and found the gates up and when no trains were coming, but people were passing under, halloaing to the watchman to raise the gates; that the gates were never hoisted all the way—they were on a slant.

And thereupon said witness, on redirect examination, testified that there was no shifting and making up or breaking up of trains on the southwest crossing, on the south track; that this was done
43 east of that crossing, and the only trains that crossed there, freight or passenger, were trains that were already made up; that once in a while a passenger engine comes down from the Jersey yard on the north side of the crossing and switches off onto another track to get a car or something like that. Said witness further testified that they would hoist the gates at night high enough for a man driving a buggy to go under them, and then lower them again; that this south track from the southeast crossing to its western extremity was rusty—you could see it was seldom used.

JAMES MARTIN testified that he lived on South Capitol street about half a mile below the southwest crossing of South Capitol street and the railroad tracks; that he had been born and raised in that vicinity, and had occasion to cross very often this crossing, walking and in vehicles, both in the daytime and night-time; that he always found the gates down at the southwest crossing in the summer of 1898 after 10 or 11 o'clock at night, whether trains were coming or not; that he did not remember a single instance when he found the gates up after 10 or 11 o'clock at night; that he had been driving up and down there once or twice a week since about 1886; at this crossing there are three regular tracks and one shorter track which goes to the property yard or about to the building line of F street; that he has seen a couple of cars standing on the south track west of the southeast crossing, but has never seen them make up trains there.

Thereupon said witness, on cross-examination, further testified that he had seen cars run in on the south track and left there, but had never seen them pulled out; that he had caught cars on
44 this south track near this crossing once or twice a week; the cars that he had seen there contained coal; he had frequently seen them move cars backwards and forwards across the southwest and southeast crossings of South Capitol street; sometimes trains were made up there, and sometimes the trains came up from the

other end; that he mostly approached the gates from the north, after about 9 or 10 or along about 12 o'clock; that he could see very plainly toward the west, coming from the north, but it was almost impossible to see toward the east on account of Pullman cars standing there; the gates were always down, and during the 15 years that he has crossed there he has had to wake up the watchman two or three times probably; on the other occasions when he would come there he would call to the watchman and he would raise the gates if there was no train coming; he thought it was the custom for him to leave the gates down—he thought it was a safeguard; that he did not know any better then and deemed it a proper thing, because of the small amount of use of that crossing at that time of night, to have the gates raised when anybody wanted to go through if no train was approaching; that if there was any doubt as to whether any train was approaching the watchman would always call to the watchman on the other side and ask him if a train was coming; that he regarded these precautions of keeping the gate down at that time of night and of calling to the watchman on the other side to know whether a train was coming or the track was clear as a safeguard and a proper thing to do.

And thereupon said witness, on redirect examination, further testified that sometimes he would catch a passenger train at this crossing, and sometimes he would be there when they were making up passenger trains; that he saw them making up and breaking up trains to the east of the crossing, but they would pull cars over the crossing sometimes when they had a long train; that he believed he had seen trains crossing at that crossing more frequently in the daytime than in the night-time; that he only found the watchman asleep two or three times, and the only difficulty he had in getting him to raise the gates occurred when the watchman was in his box late at night, but always found the gates down.

And thereupon said witness, on recross-examination, further testified that he always found the watchman there; that he very seldom caught the shifting engine there at night; that he thought trains were made up in the daytime because he had never seen much shifting done at night; when he approached the south side of this crossing in the daytime it would be impossible to see towards the west, and very seldom to the east, on account of the watch-box; in the daytime the gates were always up except when a train was passing; when he was coming from the south, going north, he always depended on the gateman to ascertain whether trains were approaching; he could not tell himself in any other way.

And thereupon said witness further testified, in answer to questions propounded by counsel for the plaintiff, that the tool-house and lumber yard west of the crossing would prevent a person approaching the gate from the south from seeing an approaching train from the west; that if there were two cars standing on the south track he would be unable to see a train coming from the west unless he got outside of that track; that it would be harder to see at night than in the day time.

46 Thereupon said witness, in answer to questions propounded by counsel for the defendants, further testified that approaching this crossing from the south, after passing the gate and standing upon the space between the gate and the south track, there was nothing to obstruct the view unless a box car should happen to be standing there to the east; that the watch-box would not obstruct the view; that he meant that when he was driving, before he passed the gates, it might do so, but after getting inside the gates it would not stop your view; that he would go under the gates to get the view.

ELMER E. WILKINSON testified that in the summer of 1898 he resided on South Capitol street, south of the railroad crossing, and had been living there about 11 years; that he usually took the southwest crossing of South Capitol street in going to and from the city; that he had crossed at this crossing for 12 or 15 years, and at night-time, after the usual bed-time, the gates were usually kept down, whether trains were coming or not; he often had to ask the man to hoist the gates, and sometimes would have to wake him up; that he crossed there at night once or twice or three times a week; that he would not like to say any instance when he found the gates up at night; that he was somewhat familiar with the use of the tracks at that point; that the end of the south track is generally used to stack cars.

And thereupon said witness, on cross-examination, further testified that he had seen cars stacked in there most always when he would pass there; that he can only recall seeing them move cars in there on one occasion; that he judged they moved the cars in and pulled them out on this track; he never noticed the condition of the rails of the south track as to whether they were rusty or bright;

47 he never noticed anything unusual in the appearance of the rails of that track; they looked about the same as the other rails, so far as he noticed; that if they had been more rusty than the other rails he does not know that he would have noticed it; all of the rails looked pretty generally alike; that he would approach the gates from the south any time from half past six or seven o'clock on, and usually found the gates down; sometimes there would be two or three teams waiting there; sometimes you might find trains passing or that they had just passed, and they would then let you through, or maybe they would hold you there until another engine would pass down; that generally he would not stay there, but would go through and take whatever risk attached to it; that he always got through before the engine would even get in sight; that he had gone under the gates and over the crossing when cars or engines were approaching; that when he returned in the neighborhood of ten or twelve o'clock at night he would generally find the gates down; that he could not say that he has ever come down there and found the gates up when no trains, cars, or engines were moving in that vicinity; that when he found the gates down he would just go under the gate and go on through without calling to the watchman to raise the gate.

JOHN G. OESER testified that in 1897 and 1898, and along there, he lived on South Capitol street south of the railroad tracks, and had occasion to pass the southwest crossing sometimes two or three times at night; that he generally crossed this crossing fifteen or sixteen times each week, night and day, in going to his business at the K Street market; that he has crossed there at all hours of
48 the night, from 9 until 1 o'clock at night; that during the years 1897 and 1898 the gates after bed-time were kept down all the time; that he never saw the gates up after bed-time except when some one would ask to have them raised; that the end of the south track west of the southeast crossing of South Capitol street was generally used for coal cars; that they made up and broke up trains to the east, up at New Jersey avenue; that he has never seen them making up and breaking up trains as far west as the southwest crossing of South Capitol street; freight trains are made up at Benning's, east of the tunnel.

And thereupon, on cross-examination, said witness further testified that after 9 o'clock at night he would very often catch trains at the crossing, they generally made a practice of standing right there or of moving up and down upon that crossing; that sometimes there would be no trains there and at other times there would be two or three trains, one right after the other; that on four different occasions during the eleven years that he lived down there he has been there and — to wake the watchman up in order to get him to raise the gates; the tracks at this crossing were in very frequent use; cars, trains, and engines were crossing up and down those tracks pretty much all the time; that the crossings down there are dangerous; they would not be so dangerous if the watchman would only attend to their business at South Capitol street; that the southernmost track is always filled with coal cars, and a person coming from the south could not see any train approaching from the west until they got on the north-bound track; that the crossing would not be dangerous if the man there attended to his business and did not sleep all night; that sometimes when cars were coupled right they would come down on you; that he had seen them
49 go through there and smash cars several times.

And thereupon, on redirect examination, said witness further testified that during the years 1897, 1898, and 1899 he crossed there at all hours from six or seven until twelve o'clock at night and three o'clock in the morning; that sometimes he would find a train there and sometimes he would not, but would always find the gates down.

And thereupon, on recross-examination, said witness further testified that he had known cars to be smashed up there once or twice by going all the way across this crossing.

Thereupon it was agreed by and between counsel that the track on which the accident occurred belonged to the Baltimore & Potomac Railroad Company, but was operated at the time of the accident by the Philadelphia, Wilmington & Baltimore Railroad Company.

WILLIAM R. MILLER testified that he was engaged in the lumber business at the corner of South Capitol and G streets southwest; that there was a small strip of land between the railroad track and their yard; that he was conducting this business at that point from 1897 until 1899; that the south track west of the southeast crossing of South Capitol street he has always considered as a storage yard running from New Jersey avenue parallel to the property yard; that he has never known them to make up a train there; the trains are made up further east—east of the southeast crossing; that standing outside of and south of the gates of this crossing you could not see any great distance in either direction; by stepping out further under the gates you could see further down the tracks.

50 And thereupon said witness, on cross-examination, further testified that by going out on the first track you could get a very good view in both directions—probably further to the east than to the west; that if the west end of the track were occupied by cars a person could not see any distance at all, and you would have to go past the cars that might be standing on that track; that if you passed under the gate and were standing on the open space between the inside of the gate and the south rail of the southernmost track you could see to the east a distance of about 100 feet or more; that he did not know anything about the use of the crossing in the night-time; that by storage track he meant that very frequently cars containing railroad supplies stood there for a number of days without being unloaded; that he never knew a car to be put in there except for the company's purposes; that he has often seen cars pushed in and pulled out of there over the southwest crossing of South Capitol street.

And thereupon, on redirect examination, said witness further testified that they stored passenger coaches east of the southeast crossing of South Capitol street where they make up their passenger trains.

HENRY E. TRIPP testified that he had lived all his life about 200 feet from the southwest crossing of South Capitol street and Virginia avenue; that he was engaged in the business of a carriage and wagon builder, and that his place of business commanded a view of the South Capitol Street crossing; that the south track, known as the ladder track, west of the southeast crossing was not used for anything but storage, as far as he knew; that he does not think they could use it for making up and breaking up trains, because

51 it does not run over 200 or 250 feet from the southwest crossing; that they stored their passenger cars in the Jersey yards where they make up trains, also on the north track on Virginia avenue to the east of the southeast crossing, where they make up trains; that the western end of the south track was used mostly for the storage of coal, as he supposed, for the use of the railroad company; that in the summer of 1898, including the month of August, the gates at this crossing after the usual bed-time were

mostly kept down; that he has seen them down at 9 o'clock, and presumes that they were kept down all night; every time he saw them they were down, whether trains were passing or not.

And thereupon, on cross-examination, said witness further testified that his house faced the railroad tracks; that when people approached the crossing at night and wanted to cross, if they were walking, they would generally stoop under the gates and walk across; if driving they would have to holler to the watchman to raise the gates; that he has seen this along in the summer of 1898; that they would be up at times, but always down when trains were passing.

C. FRANCIS JENKINS testified that he had been a locomotive fireman, and had frequently shifted cars to make up trains, including Pullman cars and passenger coaches; that a Pullman car running slowly, as fast as a man would ordinarily run, on a straight track, would make practically no noise at all; very much less noise than an ordinary passenger car; that they were built purposely for that object; they are very much heavier than passenger coaches and more staunchly built; they are built with a longer truck and wheel base and softer springs. Said witness further testified that the light in the vestibule of a Pullman car is so located as to illuminate the platform only; that is the purpose of that light; that it does not throw the light more than a couple of feet beyond the end
52 of the bumper of the car; it is not intended to illuminate the track.

And thereupon, on cross-examination, said witness further testified that such a light was not intended for a locomotive headlight; that if a man was standing on the track some distance from the advancing end of a car showing such a light he would not see the source of the light, but would see the reflected light on the platform on the car; he could see the illuminated end of the car; that if he was not looking exactly in that direction this light would not attract his attention away from something else; that if he were looking up the track he could see the light if he were not too far away.

JOHN T. WEBSTER, recalled, further testified that he had noticed the movement of passenger coaches and Pullman cars which were being shifted backwards and forwards in the railroad yards a great many times; that a Pullman car running along an ordinarily straight track at a rate of speed a little faster than a man ordinarily runs or can run does not make any noise; that he had experienced it often; that he had seen them shifted in front of his house and they would not make any noise going at an ordinary speed unless an engine were connected with them; that a Pullman car makes less noise than an ordinary coach.

And thereupon, on cross-examination, said witness further testified that he did not say when last on the stand that they did not shift cars west of the South Capitol Street crossing; that he meant to say

they shifted on the east end a great deal more than they did
53 on the west; they did most of the shifting at the east end; that they would often want to get a certain car off the siding and would run a Pullman car or a common ordinary coach down along the north track past his house and past the F Street crossing; that this was a common thing; they did it often; the shifting of cars on that north track in front of his house to the west of the South Capitol Street crossing was done frequently; that a Pullman car or an ordinary coach would make considerable noise in bumping over the end of a switch.

And thereupon the plaintiff, CATHARINE LANDRIGAN, further to maintain the issues upon her part joined, testified that she was 27 years of age, and was the widow of Thomas J. Landrigan, to whom she was married on February 18th, 1892; said Landrigan died August 29th, 1898; that at the time of his death he was on the night force at the Pennsylvania Railroad round-house; he was employed there as machinist and assistant boss; he had been on the night force for about eight years; that their home was north of the railroad tracks on Virginia avenue; that said Landrigan in going from his house to the round-house crossed the railroad tracks at the southwest crossing of South Capitol street and Virginia avenue; that his hours of work were from 7 in the evening until 6 in the morning, with an hour off from 12 to 1 o'clock for lunch; that sometimes he would come home a little before 12 and sometimes a few minutes after 12; that he received on an average $65 a month; at the time of his death he was 32 years of age; that they had no children; that out of his salary he contributed to the support of the witness from $53 to $58 a month; that this sum of $58 was for the household expenses generally. Said witness further testified that
54 about two weeks after her husband's death she viewed the spot where the accident happened, and noticed that the rails of the south track at that point were rusty; that this rust extended from the end of that track to the southeast crossing; that east of the southeast crossing the tracks were brighter; that the two center tracks at the southwest crossing were very bright, but the track on the north was not quite so bright as the center tracks; that she has seen cars loaded with coal and railroad ties standing at times on the south track west of the southeast crossing; that this portion of the track was not used for switching purposes. Said witness further testified that the night her husband was killed was dark and cloudy.

And thereupon the plaintiff, further to maintain the issues upon her part joined, gave in evidence an extract from the American tables of mortality, showing the probable duration of life of Mr. Landrigan at the age of 32, and of Mrs. Landrigan at the age of 26, to wit:

Mrs. Landrigan; age, 26; community life, 39.11; probable individual life, 69.

Mr. Landrigan; age, 32; community life, 33.92; probable individual life, 63.

And thereupon counsel for the defendants, upon the foregoing, which was all the evidence offered or produced in the case, moved the court to instruct the jury to return a verdict for said defendants; but the court overruled said motion; to which ruling of the court the defendants, by their counsel, then and there duly excepted, and said exception was noted at the time upon the minutes of the court.

55 And thereupon, upon all the evidence hereinbefore set forth, which is hereby referred to and made a part hereof, the plaintiff, by her counsel, prayed the court to instruct the jury as follows, which the court accordingly did:

"2. The jury are instructed that if they believe from the evidence that the gates at the crossing where the deceased received his injury, were generally kept down at night from 10.30 or 11 o'clock until the early morning, without regard to the approach or presence of a car, a train, or trains or locomotives, and shall further conclude from all the facts and circumstances of the case that the deceased had knowledge of that fact, then the circumstance that the gates at the intersection of South Capitol street were down at the time of the accident was not of itself a warning to him of the presence of danger, and contributory negligence cannot be imputed to him from that fact alone."

"3. While knowledge by the deceased of the presence of the Fenton engine on the north track or partly upon the South Capitol Street crossing and the approach of No. 78 upon one of the central tracks at or near the time of the accident might or would indicate the presence of danger on or near those tracks, it is for the jury to determine upon all the facts of this case whether it was a want of ordinary or reasonable care and prudence upon his part to be upon the south track, at the point upon said last-named track at which they shall find from the evidence the accident occurred."

56 "4. The degree of care that was proper care on part of the deceased and defendant must fit and grow out of the time, the occasion and circumstances. The care to be exercised is such as an ordinarily prudent man would exercise under the circumstances developed by the evidence in this case. This is the true rule whether applied to the negligence of the railroad company or to the alleged contributory negligence of the deceased, and what is due care under the circumstances of this case must be determined by the jury by applying the rule as to what in their judgment a man of ordinary prudence would have done under the circumstances shown by the evidence."

And thereupon the court voluntarily gave the following substitutes for the first, fifth, and sixth prayers offered by the plaintiff:

("*Substitute for Nos.* 1 & 6.)

In the absence of all evidence tending to show whether the plaintiff's intestate stopped and looked and listened before attempting to cross the said south track, the presumption would be that he

did. But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances proved in this case do rebut that presumption, and if they find that they do they should find that he did not so stop and look and listen, but if the facts and circumstances fail to rebut such presumption then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did not all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary."

("*Substitute for No.* 5.)

57 The burden of proving that the accident to the plaintiff's intestate occurred through his contributory negligence is upon the defendant. But it may rely upon any evidence introduced by the plaintiff tending to show such contributory negligence, if any there be. But in order to justify the jury in finding contributory negligence, all the evidence tending to establish it should be weightier in their minds than all tending to negative it."

"That in considering and determining the question of alleged contributory negligence of deceased, the character of the track upon which deceased was (if the jury shall find that he was upon one of the tracks of the defendant *was so* at the time he was hurt), the purpose for which said track was used, the extent of its use and all the facts and circumstances surrounding the injury that caused deceased'- death should be taken into consideration in deciding whether or not deceased was guilty of contributory negligence or not."

To the granting of which prayers and each of them the defendants, by their counsel, interposed and objected; but the court overruled said objections, and said prayers were given to the jury; to which ruling of the court the defendants, by their counsel, then and there separately and severally excepted, and said exceptions were noted at the time upon the minutes of the court.

And thereupon the defendants, by their counsel, prayed the court to instruct the jury as follows:

"1. If the jury shall find from the evidence that at the time the plaintiff's intestate approached the crossing in question the safety gates were closed or lowered and that said intestate went under said gates and stood upon or near enough to the south or 'ladder'
58 track at or near the said crossing to be struck by a passing car and that while so standing upon or near said track he was struck by a car moving upon said track and received the injuries which resulted in his death, then the plaintiff's intestate was guilty of contributory negligence and the verdict must be for the defendant."

"2. If the jury shall find from the evidence that at the time the plaintiff's intestate approached the crossing in question the safety gates were closed or lowered, then they are instructed that the gates so closed or lowered were a warning to all persons approaching said crossing that cars, engines or trains might be expected to pass over and upon all or any of the railroad tracks at said crossing

while the gates remained so closed or lowered, and if the jury shall further find from the evidence that the plaintiff's intestate did not heed such warning but went under the closed gates and was struck by a car moving upon one of the defendant's tracks at said crossing and thereby received the injuries which resulted in his death, the plaintiff cannot recover in this action and the verdict must be for the defendant."

"3. If the jury shall find from the evidence that at the crossing in question and on the occasion complained of the defendant maintained four (4) tracks, the most northerly of which was used for the passage of freight trains and for shifting purposes, the most *southerly, commonly called the* 'ladder' track, being used for shifting trains and storage purposes, and the two intermediate tracks for the general business of the company, and that the
59 defendants also maintained at said crossing safety gates operated by a gateman and at the time the plaintiff's intestate approached said crossing on the night of the accident these gates were closed or lowered and a freight or mixed train, with an engine attached, was standing upon the most northerly track on said crossing, and a shifting engine with a train of cars was operating upon said southerly or 'ladder' track in the railroad yards immediately east of said crossing and a regular express train was about due at said crossing, then the jury is instructed that said gates were closed or lowered for all trains, cars, or engines which were moving or passing or which might move or pass upon all or any of said tracks at said crossing and were a warning of danger which the plaintiff's intestate was bound to heed, and if the jury shall find that the plaintiff's intestate met his death by going under said gates and upon or so near to one of said tracks as to be struck by a car moving on said track he was guilty of negligence contributing to the accident, and the plaintiff cannot recover in this action."

"4. It was the duty of the plaintiff's intestate before he attempted to go upon any one of the railroad tracks of the defendant at the time and place in question to look both up and down such tracks for approaching cars, engines and trains and also to listen for such cars, engines and trains, and the burden of proof rests upon the plaintiff to satisfy the jury by competent evidence that the deceased did so look and listen and that he was free from any fault, which contributed to the accident. The charge of negligence against the defendant is the foundation of this action and the plaintiff is bound to satisfy the jury by a fair preponderance of the evi-
60 dence that the injury to the deceased was occasioned solely by the negligence of the defendant, otherwise the defendant is entitled to the verdict."

"5. The jury are further instructed that there is no presumption of law that the plaintiff's intestate did so look and listen before going upon or dangerously near to the tracks at the crossing and on the occasion in question, but on the contrary the law requires that this precaution on the part of the plaintiff's intestate shall be fully established to the satisfaction of the jury by a fair preponder-

ance of the evidence in the case, and the jury are instructed that there is no evidence in the case from which they can find that said intestate did so look and listen."

"6. The jury are instructed that no evidence has been submitted in this case upon which they would be justified in finding the existence of any usage or custom to keep the crossing gates at the crossing in question lowered from 10.30 or 11 o'clock in the evening until an early hour in the morning irrespective of the passage of trains, cars, or engines."

"11. It appearing from the uncontradicted evidence in the case that the defendants maintained at all hours of the night a gateman in charge of the gates at the crossing in question who raised and lowered said gates as occasion might require, and it further appearing from such evidence that such gateman was accustomed to open or raise said gates for the passage of pedestrians or vehicles when it was safe to do so, and it further appearing that the crossing in question being adjacent to the shifting, storage and engine yards of said defendants and between such yards and their passenger and
61 freight stations in the city of Washington and that the main tracks leading to and from said stations also passed over the same said crossing was an especially dangerous place, the jury are instructed that in the absence of any evidence tending to show that the plaintiff's intestate, upon approaching said crossing and finding the gates between him and the tracks lowered or closed, made any request of the gateman to raise or open the same or submitted any inquiry as to whether any engines, cars or trains were approaching said crossing before he went under said gates and entered upon the crossing within the same and thereby received the injuries which resulted in his death, said intestate was guilty of negligence directly contributing to his own misfortune and the plaintiff cannot recover."

But the court refused to grant each and all of said prayers so offered by counsel for the defendants, and to such refusal of the court to grant each of said prayers counsel for the defendants then and there separately and severally excepted, and such exceptions were noted at the time upon the minutes of the court.

And thereupon the court voluntarily and of its own motion instructed the jury as follows:

"The COURT: Gentlemen of the jury: The declaration in this case avers that the plaintiff, Catharine Landrigan, was duly appointed administratrix of Thomas J. Landrigan, and that the plaintiff sues the defendants, The Baltimore and Potomac Railroad Company and The Philadelphia, Wilmington and Baltimore Railroad Company, bodies corporate, having officers and agents doing business in the District of Columbia, for that the said defendants, here-
62 tofore, to wit, on the 29th day of August, 1898, and for a long time prior thereto, the defendant, The Baltimore and Potomac Railroad Company, owned, managed, and controlled a certain railroad, operated by steam, together with tracks, cars, and locomotive engines; that the said railroad tracks were and are located on cer-

tain streets and avenues in the city of Washington, District of Columbia, and intersect and cross certain others; that, among others, said tracks were and are located upon and along what is known as Virginia avenue southwest, and intersect and cross what is known as South Capitol street; that the defendant, The Philadelphia, Wilmington and Baltimore Railroad Company, also was and is accustomed to operate and use under lease, license, or permission from the defendant, The Baltimore and Potomac Railroad Company, sundry of said tracks, including that on Virginia avenue southwest, at its said intersection with said South Capitol street; and it then and there became and was the duty of the said defendants to guard and protect the public from all trains and engines propelled upon said tracks, and properly and securely to fasten and couple together, and properly and securely to furnish and equip their said cars with safe and efficient brakes, and to give timely warning and notice of the approach of all engines and cars upon said tracks to all persons desiring to cross said tracks at the intersection of the aforesaid street and avenue; and it then and there became and was the duty of the defendants to keep a diligent and careful lookout upon all moving cars and engines for persons crossing said tracks and to have and to keep lights on the end of their said cars when being propelled or moved along said tracks after dark.

63 Yet, the defendants, on to wit: the 29th day of August, 1898, disregarding their duty in the premises, so carelessly, negligently, and improperly conducted themselves in this behalf that at the time and place aforesaid Thomas J. Landrigan, plaintiff's intestate, while attempting to cross said Virginia avenue southwest, at its said intersection with said South Capitol street upon the public highway in said city, as he had a right to do, was through the carelessness, negligence, and improper conduct of the defendants thrown down and run over by a car or cars operated as aforesaid and running backwards upon one of the said tracks operated as aforesaid by the defendants, said cars or cars being then under the management and control of the defendants' agents, servants, and employees; that the defendants by their agents, servants, and employees were on, to wit: on the day and year last aforesaid, at a late hour at night, shifting, or causing to be shifted, certain cars, and so negligently, carelessly, and improperly coupled together, their said cars, and so negligently, carelessly, and improperly failed to furnish and equip said cars with safe and efficient brakes, and so negligently and carelessly and improperly failed to give any proper notice or warning of the movement of said cars, by having and keeping a light or lights upon the ends of said cars, or by the ringing of bells, or blowing of whistles, or by giving other signs, notices or warnings, that the said Thomas J. Landrigan while in the act of crossing said railroad tracks, as he had a right to do, and without any want of due or reasonable care on his part, was thrown down and run over and killed by one of said cars, being shifted as aforesaid, breaking loose and running

back upon him without any notice or warning of the ap-
64 proach of said car, so running backward upon the said Landrigan, as aforesaid; that the said Landrigan, had he not been killed by the said wrongful act, neglect, and default of the said defendants' agents, servants, and employees, as aforesaid, could have maintained an action and have recovered damages for the said wrongful act, neglect, and default as aforesaid; that the plaintiff's intestate left him surviving a widow, a mother, a brother, and a sister, and by reason of the premises and the statute in such case made and provided an action for damages hath accrued to the said plaintiff, to wit: in the sum of ten thousand ($10,000) dollars, therefore the plaintiff sues. And the plaintiff claims of the said defendants the sum of ten thousand ($10,000) dollars, besides costs of this action.

To this (action) declaration the defendants have pleaded the general issue, not guilty. It becomes the duty of the plaintiff, upon this trial, to prove by a preponderance of the evidence the averments substantially as laid in this declaration. That is, the facts as stated in the declaration are to be substantially proven by the plaintiff by a preponderance of the evidence before the*m* can claim a verdict at your hands. The right to recover in this action is based upon the alleged negligence of the railroad companies. In order to find a verdict for the plaintiff, you must find that the railroad company was guilty of negligence, that that negligence resulted in the death of the plaintiff's intestate, and that there was no negligence upon the part of the plaintiff's intestate which directly caused, contributed to his death. The question of whether either the defendant or the plaintiff's intestate was guilty of negligence that caused the death is a question of fact for you.
65 The law can only define to you what negligence is, and then you must take the facts you have and fit them into that definition, and see whether the defendant was guilty of negligence; and then, if you find that the defendant was guilty of negligence, fit the facts into that definition for the purpose of determining whether the plaintiff's intestate was also guilty of negligence. If you find both the plaintiff and the defendant's intestate to be guilty of negligence, then you must find for the defendant, for the reason that if the defendant be guilty of negligence, and yet the plaintiff's intestate was also guilty of negligence, the representative of the deceased man who was injured, whose death came by this accident, cannot recover for the loss.

The instruction given which defines negligence I read that to you now as a definition of negligence. That is, when you are inquiring whether the defendant was guilty of negligence, or whether the plaintiff's intestate was guilty of negligence, you apply this definition to the facts so presented. "The degree of care that was proper care on the part of the deceased and defendant must fit and grow out of the time, the occasion and circumstances. The care to be exercised is such that an ordinary person would exercise under the circumstances developed by the evidence in this case. This is the

true rule whether applied to the negligence of the railroad Co. or to the alleged contributory negligence of the deceased, and what is due care under circumstances of this case must be determined by the jury by applying the rule as to what in their judgment a man of ordinary prudence would have done under the circumstances shown by the evidence."

66 It is not a question of what an ordinarily prudent man would have done generally, but it is what an ordinarily prudent man would have done under the particular circumstances and facts of the particular case. What would be ordinary care under some circumstances would be gross negligence under others; so that when you are testing a man's conduct for the purpose of ascertaining whether he has used ordinary care, and therefore has not been guilty of negligence, or whether he has failed to use ordinary care and has therefore been guilty of negligence, you are to test his conduct by the particular facts and situation in which he is placed at the time the question arises.

The first question is, was the defendant railroad company guilty of negligence? The plaintiff claims that it was in three particulars: in coupling the cars, in having a car that had brakes out of order, and in not having sufficient light.

You first determine how the coupling was made, and then you ask yourselves the question, after you have determined how it was made, whether that was what a reasonably prudent man, doing that kind of a piece of business under the circumstances, would have done. If so, the railroad company's employees would not have been guilty of negligence in doing what they did do. If you reach the conclusion under all the circumstances of the case that a reasonably prudent man doing that thing would have done it in that way; but, if you reach the conclusion that a reasonably prudent man doing that thing under the circumstances in which those men were called upon to do it *it* would not have done it in that way, then the railroad company through its employees who did it was guilty of negligence in doing it in that way.

67 So you see, whether the railroad company was guilty of negligence or not in that particular is a question of fact for you, and you are to test it not by this definition alone that I have given you, but by that definition considered in connection with the particular facts and surrounding circumstances under which that act was done.

(The clerk at this point, counsel for both the plaintiff and the defendants consenting, read the following instructions which the court had granted:)

Plaintiff's 2nd Prayer.

"The jury are instructed that if they believe from the evidence that the gates at the crossing where the deceased received his injury, were generally kept down at night from 10.30 or 11 o'clock until the early morning, without regard to the approach or presence of a car, a train, or trains or locomotives, and shall further con-

clude from all the facts and circumstances of the case that the deceased had knowledge of that fact, then the circumstances that the gates at the intersection of South Capitol street were down at the time of the accident was not of itself a warning to him of the presence of danger, and contributory negligence cannot be imputed to him from that fact alone."

Plaintiff's 3rd Prayer.

"While knowledge by the deceased of the presence of the Fenton engine on the north track upon of partly upon the South Capitol Street crossing and the approach of No. 78 upon one of the central tracks at or near the time of the accident might or would indicate the presence of danger on or near those tracks, it is for the jury to determine upon all the facts of this case whether it was a want of ordinary or reasonable care and prudence upon his part to be upon the south track, at the point upon said last-named track at
68 which they shall find from the evidence the accident occurred."

Plaintiff's 4th Prayer.

"The degree of care that was proper care on the part of the deceased and defendant must fit and grow out of the time, the occasion and circumstances. The care to be exercised is such as an ordinarily prudent man would exercise under the circumstances developed by the evidence in this case. This is the true rule whether applied to the negligence of the railroad company or to the alleged contributory negligence of the deceased, and what is due care under the circumstances of this case must be determined by the jury by applying the rule as to what in their judgment a man of ordinary prudence would have done under the circumstances shown by the evidence."

Substitute for Plaintiff's 1st & 6th Prayers.

"In the absence of all evidence tending to show whether the plaintiff's intestate stopped and looked and listened before attempting to cross the said south track, the presumption would be that he did. But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances proved in this case do rebut that presumption, and if they find they do they should find that he did not so stop and look and listen, but if the facts and circumstances fail to rebut such presumption, then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did not, all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary."

Substitute for Plaintiff's 5th Prayer.

"The burden of proving that the accident to the plaintiff's
69 intestate occurred through his contributory negligence is upon the defendant. But it may rely upon any evidence introduced by the plaintiff tending to show such contributory negligence, if any there be. But in order to justify the jury in finding contributory negligence, all the evidence tending to establish it should be weightier in their minds than all tending to negative it."

Plaintiff's 6 7th Prayer.

"That in considering and determining the question of alleged contributory negligence of deceased, the character of the track upon which deceased was (if the jury shall find that he was upon one of the tracks of defendant, and was so at the time he was hurt), the purpose for which said track was used, the extent of its use and all the facts and circumstances surrounding the injury that caused deceased's death, should be taken into consideration in deciding whether or not deceased was guilty of contributory negligence or not."

The court, through the clerk, thereupon read the following prayers, granted on behalf of the defendants:

Defendants' 7th Prayer.

"The jury are instructed that there is no evidence in this case from which they would be justified in finding that the lead or ladder track at the point near which the plaintiff's intestate was injured was an unused track, but on the contrary, as the undisputed evidence shows said track was used at irregular intervals, more or less, and such use made it incumbent upon the plaintiff's intestate to exercise due care and caution, under all the circumstances, before attempting to cross the same, and if the jury shall find that plaintiff's intestate did not use such due care and caution and
70 did not look and listen with *in*tention for any train or car that might be approaching on said track, and that his failure so to do contributed to his injury, then their verdict should be for the defendant."

Defendants' 8th Prayer.

"The jury are instructed that unless they are satisfied from the evidence that the plaintiff's intestate was injured by being struck and run over by the Pullman car which was moving on the south or 'ladder' track at the crossing and on the occasion in question, then their verdict should be for the defendant."

Defendants' 9th Prayer.

"Before the jury can find for the plaintiff they must be satisfied by a fair preponderance of the evidence that the defendant was guilty of negligence directly responsible for the accident."

Defendants' 10th Prayer.

"If the jury shall find for the plaintiff then the measure of damages will be the pecuniary loss sustained or which may be sustained by the widow of the deceased by reason of his death; but the burden of proof rests upon the plaintiff to satisfy the jury by evidence that said widow, by reason of said death, sustained or will sustain pecuniary loss, and the extent thereof.

And, in estimating such damages, the jury are limited to the consideration of pecuniary loss solely, and nothing can be estimated or allowed for shock, grief, or mental suffering of the deceased or of his widow, and nothing can be estimated or allowed for the loss to the widow of the society of the deceased, and nothing can be estimated or allowed for punitive or exemplary damages or smart money against the defendant because it is a railroad company and one of its cars or trains caused the death of the plaintiff's
71 intestate."

The COURT: "So far as I can discover, all of the points in issue between counsel are embraced in the instructions that have been given. You have heard, gentlemen, from counsel, that should you, after your deliberations, find that the plaintiff is entitled to a verdict, that the parties have agreed upon what the amount of that verdict shall be; and, accordingly, if you find for the plaintiff, you will find in the sum of $6,500. If you find for the defendant, your verdict will simply be, for the defendant. Whether you find for the defendant or for the plaintiff, your duty in that respect has been embraced within the prayers which have been read to you by the clerk, which have been adopted and sanctioned by the court. You will follow those instructions as your guide in the performance of your duty when you retire. You may retire, gentlemen."

Mr. FLANNERY: We renew our exceptions to the refusal of our prayers, and to the granting of those of the plaintiff.

Be it further remembered that each of the separate and several exceptions taken by counsel for the defendants, as hereinbefore set forth, was so taken by counsel for the defendants then and there before the jury retired, and each of said exceptions was then and there separately and severally duly entered upon the minutes of the justice presiding at the trial, and counsel for said defendants then and there prayed the court, and now prays the court, to sign and seal this bill of exceptions, and at the request of counsel for said

defendants the same is accordingly signed and sealed and
72 made a part of the record in this case this 27th day of December, A. D. 1901.

E. F. BINGHAM,
Chief Justice Supreme Court, D. C. [SEAL.]

Settled by counsel this 27th day of December, 1901.

DOUGLASS & DOUGLASS,
JOSEPH D. WRIGHT,
Attorneys for Plaintiff.
F. D. McKENNEY,
J. S. FLANNERY,
Attorneys for Defendants.

73 UNITED STATES OF AMERICA, } ss:
District of Columbia, }

Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 72, inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 42828, at law, wherein Catharine Landrigan, administratrix of the estate of Thomas J. Landrigan, deceased, is plaintiff and The Baltimore & Potomac Railroad Company *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 14th day of January, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1168. The Baltimore & Potomac Railroad Company *et al.*, appellants, *vs.* Catherine Landrigan, administratrix, &c. Court of Appeals, District of Columbia. Filed Jan. 14, 1902. Robert Willett, clerk.

FRIDAY, *April 11th, A. D.* 1902.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY and The Philadelphia, Wilmington and Baltimore Railroad Company, Appellants,
vs.
CATHARINE LANDRIGAN, Administratrix of the Estate of Thomas J. Landrigan, Deceased. } No. 1168.

The argument in the above entitled cause was commenced by Mr. F. D. McKenney attorney for the appellants, and was continued by Mr. J. J. Darlington attorney for the appellee.

TUESDAY, *April 15th, A. D.* 1902.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY and The Philadelphia, Wilmington and Baltimore Railroad Company, Appellants,
vs.
CATHARINE LANDRIGAN, Administratrix of the Estate of Thomas J. Landrigan, Deceased. } No. 1168.

The argument in the above entitled cause was continued by Mr. Charles A. Douglass, attorney for the appellee, and was concluded by Mr. J. S. Flannery, attorney for the appellants.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY and The Philadelphia, Wilmington and Baltimore Railroad Company, Appellants,
vs.
CATHARINE LANDRIGAN, Administratrix of the Estate of Thomas J. Landrigan, Deceased. } No. 1168.

(Mr. Justice SHEPARD delivered the opinion of the court.)

This is an appeal from a judgment for the sum of $6500 recovered of the appellant by the appellee, in an action of damages for the negligent killing of her husband, of whose estate she is the administratrix.

As the case turns upon the sufficiency of the evidence to warrant its submission to the jury, a full statement of the same is made necessary.

About midnight on August 29, 1898, the intestate, Thomas J. Landrigan, was found near one of the tracks of the Baltimore and Potomac Railroad Company in the city of Washington at the intersection of South Capitol street. He had been run over by a car or cars on one of said tracks and so badly injured that he died about 4 o'clock in the morning.

He was thirty two years old, and had a wife but no children. He had been in the employ of the railroad company for about eight years in its round house in Washington, as a machinist. He was an assistant boss of the night force with an average wage of $65. per

month. His hours of work were from 7 p. m. until 6 a. m., with an hour for lunch between twelve and one o'clock. His habit had been to go home for lunch sometimes starting a little before twelve o'clock and sometimes a little later. His nearest route led across the tracks at South Capitol street. There was testimony tending to show that the night of the accident was a dark and cloudy one. Intestate furnished from $53 to $58 per month to his wife for her support and for household expenses. His wife was twenty six years old. The American mortality tables were introduced to show the probable duration of life of husband and wife based on their respective ages at the time of his death.

Other evidence introduced on the part of the plaintiff as tending to show that the death of Thomas J. Landrigan was caused by the negligence of the defendant is recited in the bill of exceptions as follows:

"CHARLES J. MOTLEY testified that he resided at # 318 Third street southeast, Washington, D. C., and had been in the employ of the Philadelphia, Wilmington & Baltimore Railroad Company for nine years; in August, 1898, he was employed by said railroad company as flagman and extra conductor engaged in the shifting operations around the "Jersey yards" of said company; on the night Landrigan was killed he was acting as conductor and was engaged in making up trains; the "Jersey yards" extended from South Capitol street east to New Jersey avenue; the engine yard or round-house yard is also a part of what is called the "Jersey yard;" the round-house is on South Capitol street, south of the South Capitol Street crossing; at this crossing there are four tracks, the farthest to the north next to the Government reservation, being used for shifting purposes, the two tracks immediately south of it being the north and south bound main tracks, and the most southerly track being what is called the "lead" or "ladder" track; this "ladder" track was used for shifting purposes, for shifting out cars; all the tracks in the "Jersey yard" lead into the "ladder" track; said "ladder" track, from one end of it to the other, runs all the way from F street southwest to I street southeast and crosses South Capitol street; on the night of the accident to Landrigan witness was the yard conductor engaged in making up a train of tourist or passenger cars to go south; he had pulled eight or nine cars out on the "ladder" track, and while these cars were standing upon the "ladder" track the last car broke away, ran down the "ladder" track, which is an ordinary downgrade from the point where the car broke away, towards South Capitol street; at the time the coach broke away it was coming out on the "ladder" track, and the break occurred at a point leading into a switch at a little curve; this coach had been taken from one of the storage tracks and had been brought out on the "ladder" track; witness coupled the coach himself with the assistance of Brakeman Wilhoit and Mr. Hottal, the yardmaster, who was there to give him the signal; the car that broke away was a Pullman, and the car to which it had been coupled was a tourist

car; the Pullman had a Janney coupler, and there was a Miller coupler on the tourist car; the Miller and Janney couplers would not couple—they were not made or intended to couple together; one was a little higher than the other, the Janney being the higher of the two, but do not remember whether or not one went over the other; one of the drawheads also was higher than the other; it was a very difficult coupling to make, and a link and pins had to be used to couple the cars together; this difficulty arose from the fact that they were not the same sort of couplers; that he did not know whether the difference in height made them less or more difficult to couple; he coupled the two cars in question by putting a link in the Janney coupler and putting a pin through the hole in that coupler, then laid the link on top of the Miller coupler and put a pin down through it; in both the Janney and Miller couplers there is a slot for a link and also a hole for the pin to go in; he did not put the link in the slot of the Miller, because he could not get it in there; that he could not explain why he did not do it that way; it was a difficult coupling to make either way; he did not remember whether they tried to do it that way or not; he coupled it the best way he could—the easiest way he could couple it; he did not remember whether the difference in the height of the two couplers had anything to do with causing him to put the link on top of the Miller coupler instead of placing it in the slot of the Miller; he did not remember whether it was on a curve or on a straight track when he coupled the cars together; the pin held the link in position on top of the Miller coupler; the link could not very well go over the top of the pin which held it in place; leading over the switch, the two couplers rubbing together forced the pin up out of the hole, so as to pry it up. If he were coupling two cars together the drawheads of which came together plumb and even, one being as high as the other, and each containing a slot for a link and a hole for the insertion of the pin, in coupling them with a link and pin, he would put the link in the slot and not on top of the coupler; on this occasion he laid the link on top of the Miller instead of putting it in the slot, because that was the easiest and best way and the only way he could couple it; the link was too short to put it in the slot of the Miller coupler, but the link was long enough to enable the pin to go down through the hole; where the link is laid on top of the coupler instead of in the slot he does not know what would be the effect upon the rear coach if a slack should take place by the cars coming together; that the coupling which he made was a very ordinary coupling and is made right along; possibly it might hold all right; he had never seen it break loose before; it was customary to couple cars by putting the link on top instead of through the slot; this coupling was caused to break away by the slack running up between the cars when they jolted together—by the Janney and Miller couplers running up together; the rubbing together made the pin raise up and broke it loose; when coaches are properly coupled together they break loose very often in that way; when two

cars are properly coupled with the link and a slack is produced causing them to bump together, they come apart sometimes, although this is very rare and it is also very rare that the other coupling comes apart; when the car broke away he yelled to the rest of the crew who were on the rear end of the car; he was standing on the steps of the tourist car on the end next to the Pullman, which broke away; this Pullman car was called the "Lylete;" he does not remember what became of the link or pin after the car broke away; he looked at the "Lylete" and saw the link, but did not look at it particularly; he did not remember the words he used when he called to the crew; the men on the car, Hottal and Wilhoit, did all they could to stop it; he saw these men putting the brake on at the end of the Pullman car next to him, but could not see what they did at the other end; he did not know whether they left the end next to him for the purpose of putting the brakes on the other end; the car ran a little over a hundred yards probably before it stopped; it was stopped by striking some cars down on the "ladder" track; these cars were loaded with sand and coal, as well as he remembered; the end of this "ladder" track in the neighborhood of South Capitol street was used for shifting purposes and for putting cars or anything there they wanted to store there; he has never seen passenger coaches stored down there because it is not long enough for that; the only cars he ever saw stored there were freight cars. Said witness further testified that he saw Landrigan that night, and when he first saw him he was lying on the ground near to and south of the "ladder" track at South Capitol street; Landrigan was at the side of the "ladder" track, at the intersection of South Capitol street; Mr. Fenton was fixing up his wounds; Landrigan was afterwards carried away in an ambulance and died in a hospital the next morning; at the time witness saw him he looked like he was pretty badly mashed up—looked like he had been run over; that it was about 11.55 p. m. when he saw him; Landrigan lived at 31 or 33 Virginia avenue, on the north side of the railroad tracks; he was a machinist and employed on the night force in the round-house; he had known Landrigan about three years, during all of which time Landrigan had been in the employ of the railroad company. There was a white light in the vestibule of the Pullman car that broke away—in the little dome-shaped arrangement in roof of the car; this was the only light hanging in the vestibule, and there was no light on the platform; the link and pin used in making the coupling were the ordinary link and pin; that two Janney or two Miller couplers will couple together without requiring the use of a link and pin, but a Janney and Miller coupler will not couple of themselves and you have to use a link and pin to couple them; that the Miller and Janney couplers were not intended to couple together.

And thereupon said witness, on cross-examination, further testified that at the southwest crossing of South Capitol street there were four railroad tracks, the first track from the south being the ladder track, the track immediately to the north of it being the north-bound main track, the next track to the north the south-bound main

track, and the fourth track or the one on the north side of the crossing being called the reservation track—a freight track; that the ladder track extended west of the crossing to an alley (the witness indicating a point on the map about a square and a half distant), and east of the crossing it extended to K street southeast; the round-house was a little to the south and east of the crossing and there were tracks connecting it with the ladder track; east of the crossing of South Capitol street were the "Jersey yards" of the company, and all of the tracks in that yard connected with the ladder track; that this is why it is called the "lead or ladder track;" the gateman's box at the southwest crossing is at the northeast corner of the crossing, and at the southeast crossing of South Capitol street it is at the southeast corner; on the west side of South Capitol street there is a pavement leading up to the southwest crossing; there were safety gates on both sides of the railroad track at this crossing, and between the end of the gate on the south side and the tool-house west of the southwest crossing, which is marked on the map, there was a fence, five feet high, which extended up to the gate; that between the ladder track and this fence there is an open or vacant space; between the south rail of the ladder track and this fence or the crossing gates there is a space of about 10 ft.; a person could not walk around the end of the gate and get on the track. Said witness further testified that the ladder track on that night had been in use in their shifting operations from about 7 or 7.30 o'clock; that in these shifting operations they would go all the way down to the crossing at South Capitol street if necessary, but witness did not remember going all the way down there that night; on other nights they had been in the habit of going all the way and crossing South Capitol street when engaged in shifting operations; the ladder track was a track that was used more or less frequently in shifting operations from one end of it to the other; cars were put on the ladder track west of South Capitol street to be unloaded or just to get rid of them for a short while, sometimes; they would put them there so as to have them where they could get hold of the cars handy; they would be put there temporarily during shifting operations. It was not customary to handle passenger cars on that side at the southwest crossing of South Capitol street; witness and his men were freightmen ordinarily, but are called upon now and then to handle passenger cars; on the night of the accident they were handling passenger cars and were making up a train of tourist cars in which to load soldiers to go South; in the shifting operations in the yard in August, 1898, different kinds of cars would be received there—foreign cars belonging to different roads—especially at that time when soldiers were traveling there was a great deal of traffic and they were moving a great many troops; on these cars they would find a great many Miller and Janney couplers; it was more usual to find Miller couplers on foreign cars in August, 1898, than it is today; they are seldom seen now; it was an ordinary occurrence at that time in the yard to couple cars up with Miller and Janney

couplers on them; the Miller and Janney couplers are entirely different and will not couple of themselves; they must be coupled by putting a pin in the Janney and another pin in the Miller and connecting the two with a link; this is the ordinary way of coupling two such cars, and the only way that the witness knew to couple them. Witness followed the runaway car down to the crossing after he got rid of the rest of the cars; he reached there about three minutes after the car passed over the crossing; that he forgets whether he noticed the condition of the gates at that time; the crossing was lighted by the street lamps located on each of the four corners, and there was an electric light in the reservation north of the tracks (indicating a point on the map northeast of the intersection of South Capitol street and the railroad tracks) and another one south and east of the tracks near the signal tower; the lamp in the dome of the vestibule of the Pullman car had a white shade or globe underneath; it gave a bright light—you could see it all right; the lamp was inside of the door and the door was closed; the glass in the door extended about half way down and the light shown through the glass in the door; you could see the light very plainly as you looked at it; the same sort of a light was in both ends of this car. Said witness further testified that if they had not made a link and pin coupling they might have pulled the cars out with a big, heavy chain; a chain is used sometimes when the drawhead is pulled all the way out; where there are two drawheads with a coupler in each drawhead, the ordinary way to couple them is to use a link and a pin whenever the couplers are not alike.

And thereupon, on redirect examination, said witness further testified that he supposed, to guess at it, that the car ran probably a hundred yards from the place where it broke away until it hit Landrigan, and then about twenty-five yards after it hit him before it stopped. Said witness further testified that there were two crossings at South Capitol street, the southwest and southeast crossings; the street was divided by parking which ran in the center of it; these two streets or crossings were about 50 ft. apart; Landrigan was killed at the southwest crossing; the railroad tracks where they intersect with South Capitol street are on Virginia avenue. The nearest electric light to the point where Landrigan was killed was on the east side of the southeast crossing and north of the tracks; this light was about 75 yrds. from where Landrigan was struck. There were nine coaches attached to the engine when the car broke away. The car that broke away was the last coach; Hottal, the yardmaster, was present when witness coupled the cars together; that witness told him that he could couple them up the way they were coupled, and Hottal said, "Couple them up some way, and get them out of here;" at that time the crew was waiting for the car on the main track, and they were in a hurry to get it out; he was having some difficulty to get it coupled when he made this remark at Hottal; it is not true that the cars would not couple at all—they would not couple without using a link and pin; the coupling was safe enough to pull the car out of the yard, and that was all

that was wanted; it did not do it on that night because it broke loose; nothing extraordinary happened to make it break loose; the Janney coupler was about 2½ inches higher than the Miller, but he did not think that the Janney slid all the way over the Miller when they came together; he did not remember testifying at the former trial of the case that "the Janney went clean over the top of the Miller;" the Janney coupler, the lip of it, would not be over 2½ inches thick, which would pretty nearly take it over; it was about 2½ inches higher than the other, but he does not remember whether it went over it or not; whatever he testified to at the former trial was true; the couplings "slipped around," he supposed, when they were going around the curve, and that had a tendency to make them come apart; that he supposed it was due to the slack caused by coming over the switch on the ladder track; that the statement made by him at the former trial that he "used a link, put a pin down through the Miller, just a temporary coupling, to pull the car up this track, and put the link over the Miller, put the pin down in the Miller, and stuck a pin through the link, and the pin having a head on it held in that position, held the link in position to pull the car out; but when it got up on the curve the slack ran together, and probably the pin dropped down; the link jumped over, or twisted off the head of the pin—that is as nearly as I can explain it to you about this coupling"—was substantially correct. Said witness further testified that after the car was coupled they pulled it probably 45 or 50 yards, and when it got on the curve formed by the ladder track and the track from which they were bringing it, it broke away; that he knew this curve was there; that he did not remember testifying at the former trial that they could not stop the car because of a "defect in the brake, the brake did not hold," but that it is true that the brake might have hung in some way; the brake did not hold the car, but he does not know what was the matter with it; that he was taking the train of cars in the opposite direction from the point where Landrigan was killed, and intended to give this car to the crew that was waiting for it on the main track; the reason, as well as he remembers it, why he put the link on the top of the Miller coupler was because the Janney was higher than the Miller; they could have used a chain on that night, but did not have any to use when they wanted to get the car out; there were chains in the yard; he does not know whether the chain would have been perfectly safe or not; the car might have broken away by the chain becoming untied, or loose, or breaking, unless it was very strong; that he did not remember examining the pin on the tourist car, but remembered looking at the pin in the Lylete, the Pullman car; this pin was still in the hole in the link, and this satisfied him that the link had pulled over the head of the other pin.

And thereupon said witness, on recross-examination, further testified that the head of the pin would not go through the hole in the link and would hold it in position; that the drawhead was a big piece of iron fastened to the end of the car, and the coupler was at-

tached to the end of the drawhead; when the drawhead is completely pulled out the coupler comes with it; when two cars are in that condition they have to use a chain to keep them together; when the cars have a complete drawhead and coupling attached, no chain is necessary, and they simply used a link and pin coupling when the couplers are not alike; this was the way they did on that night; there was nothing the matter with the drawheads; they were simply different couplers and would not couple; they were getting these cars out to put them on the train that Fenton's engine was attached to; this train, as well as he remembered, was standing on the southbound main track, facing towards the depot; when he reached the crossing after the accident he found the engine standing there on either the main track or No. 1 track, right close to the point where Landrigan was found and about 25 yards distant; it was about northwest of the crossing, on the north side of the track, and about 10 yards from the crossing; that he did not remember exactly the position of the engine—he saw it over there, but did not take particular notice whether it was on the crossing or not.

And thereupon, on re-redirect examination, said witness further testified that Fenton's engine and train were standing nearer the southwest crossing than the southeast crossing; the engine was headed south or towards the depot, and, as well as he remembered, about 10 ft. from the southwest crossing; that he did not remember whether or not it had any box cars attached to it.

And thereupon the plaintiff, further to maintain the issues upon her part joined, read in evidence the testimony of KENNETH D. WILLHOIT, deceased, who testified for the plaintiff at a former trial of the cause. Said witness testified that he had been in the employ of the Philadelphia, Wilmington & Baltimore Railroad Company as brakeman for five years; on the night Landrigan was killed he was acting as flagman in the yard in connection with the yard engine; he did not know Landrigan personally; had seen him a number of times; he saw him after he was hurt; Landrigan's legs were run over, but he could not say whether it was by a car or another train; train No. 78, which left the depot about 11.55 or 11.35, was passing there about the time of the accident; this train No. 78 is known as the midnight express for New York and crossed South Capitol street, where Landrigan was hurt, going in an easterly direction; when witness saw Landrigan the latter was lying on the south side of the outside rail of the "ladder track," the most southerly track of the four tracks at that crossing; there is a tool-house to the west of that crossing, and a fence running along south of the tracks and in front of the tool-house; Landrigan was between this fence and the outside rail of the "ladder" track; immediately before he saw Landrigan lying there the coach "Lylete" passed over the crossing at South Capitol street and witness came right along behind this car, after train 78 passed, to see if the coach had done any damage down there and saw Landrigan lying there with some one around him; he went down where the car had stopped and came back and found out what

the trouble was; that Motley was the conductor of the yard engine and Anderson the engineer; he thinks there were five or six coaches attached to the yard engine; that an ordinary passenger coach is 60 or 70 feet long; Hottal, the yardmaster, Motley, and himself made the coupling; one car had a Miller, and the other—the one that broke away—had a Janney coupler; it is impossible to couple a Miller and Janney together; it was on a curve, and therefore they used a link and pin; it was a secure coupling to pull the car around in the yard, but it was not a safe coupling to run over the road; it was sufficient for the yard and was very frequently done; the couplings did not couple exactly because they did not fit; you cannot couple two such couplings together and have to use a link and pin; the Miller coupler is not as high as the Janney; it is a thinner piece of iron and the draw-head is thinner than that of the Janney; the link was put in the Janney all secure and then laid over the top of the Miller and a pin run through the top of the link and down through the hole in the Miller; there was a place in the Miller coupler for the link to go in, but it was a little lower and it could not be put in there on account of that curve; they coupled the cars right on a curve; the curve swayed the car around and brought the Miller coupler out on the side, like; when the pin was put down through the link and into the hole in the Miller coupler the head of the pin was on top of the link, and the only thing to keep the link from slipping over the head of the pin was the shoulder around the head of the pin; that he supposes it would have been safer if they could have put the link through the regular place for that purpose in the Miller coupler; when they were pulling the car out on the straight track he tried the brake and it appeared to be all right, but when some one hollered that this car had broken off he went to work on it again; it did not seem to catch hold; he dropped off the end of the car and caught the rear end of it—the head end—and at the same time Hottal got on the end that he got off of; the witness called for Wilber to help him to put the brake on and they did all they could to stop the car, but the car had got too much start; the brake seemed to work all right—he did not have any fault to find with the brake, only the car had gotten too much start; he first tried the rear brake and could not get that to work; then went to the other one; while witness and Wilber were working on the forward brake Hottal jumped on and tried to work the rear brake; they did not succeed in stopping the car, because it had gotten too much of a start. He got off at South Capitol street on the southeast side, stood there for a second or two, and then ran after the car to see what damage it had done. There were some other cars down on the end of this track, that this car ran into, and it would not have been safe for the witness to have stayed on the car. He found out that the car had broken loose by some one hallooing (there were five of them around there at the time), but cannot say who it was or from which direction the sound came; the car was running slowly when he started to put on the brake. He jumped off, went to the other end, and when he

got there the car was not running very fast. Hottal had got on the rear end just as he got off. That he does not know whether or not he said at the coroner's inquest that "he did not think the brake was any good or else it would have stopped the car," nor could he say whether he testified at the inquest that the front brake was loose and was not doing any good. The brake did not do any good, because the car had too much start; Wilber jumped off with him; that you sometimes apply a brake and it does not "take up" right at first; that he could not say whether he noticed any slacking up of the car as a result of putting on the brakes, because he got off, and it was dark, night-time, and he could not see; that he could not say whether he noticed any slacking up before he got off the car, because the brake had not taken any hold, so far as he knew; both Wilber and himself put the brake on as hard as they could; there was a light on both ends of the coach; there was a light in the coach, but none on the back platform; when he jumped off he did not exactly keep up with the car, but followed it down because 78 was coming at that time and he was afraid the runaway car would knock some of the cars out on the main track, and he followed down to see whether there was any trouble; that he practically kept up with the car, but was a little distance behind it; the car ran across the southeast and southwest sides of South Capitol streets, beyond the point where Landrigan was, and into some flat cars loaded with dirt.

Said witness, on cross-examination, further testified that the Jersey yards consisted of a network of tracks between South Capitol street and New Jersey avenue, south of the main railroad tracks; that what is called the "old Jersey yard" contained tracks from *1* to *11*, and the "new Jersey yard" began with track *4* and ran up to number *9*; that on the other side or east of the Jersey yards was what is called the "engine yard;" the old and new Jersey yards are used for the storage of all passenger cars, sleepers, baggage and box cars, freight cars of all descriptions, and also as a yard to unload coal and to load different freight. There is a fence running from the southeast side of South Capitol street, from the gate-tender's box to the southwest side of South Capitol street, the side next to the tool-house; that at both the southeast and southwest crossings are crossing gates, which come right up to the fence; these gates are double gates, and if they are down it is impossible for anybody to cross the track at either of the crossings at South Capitol street without getting under them; at the southeast crossing they could walk around the end of the gate, but they could not at the southwest crossing; Landrigan was found on the southwest side of the southwest crossing and on the south side of the tracks; this "ladder" track is a straight track, running from one end of the yard to the other; it is also called the "lead" track because all the other tracks in the yard lead into it; if they wanted to get a car out of the other tracks it would be pulled out on this "ladder" track; on this night they were engaged in making up an equipment of cars to carry soldiers South; there were some flat cars, stock cars, coaches, and this sleeper for the officers, he supposed; they were pulling five

or six cars out to get this sleeper—the "Lylete"—to put it on the rear of the train, their intention being to shove the remaining cars back into the track from which they got them; that he saw the coupling made, but did not make it himself; when they found cars with the old-fashioned drawhead, and wanted to couple them to a car with a Janney coupler, they used a link and pin, which was the usual coupling when they got cars of that kind; this was done very frequently, but it is not done so much now as formerly because they get more cars with the new equipment; that he did not say the Miller coupler was lower than the Janney, but that it was not as thick as the Janney, which made it apparently lower than the Janney when the cars came together; that they laid the link on top of the Miller because they could not get it into the groove; the top of the pin was holding it in place; the track on which the runaway car was ran parallel with—right by the side of—the track on which No. 78 was coming; he jumped off the "Lylete" on the southeast side of South Capitol street; 78 passed first and then he ran down the north-bound track behind the "Lylete;" that he saw some one was hurt when he went down, but did not stop because, by the light being in the car, he thought perhaps there was a porter or somebody in there, and ran down to see what damage had been done to the car; when he saw nothing serious had happened, he came right on back to see this object; it was not over three minutes—not over two minutes—when he got back. When he got back he saw Mr. Fenton behind, attending to Mr. Landrigan, with his torch. Fenton had started to bind up Landrigan's legs; Fenton's engine was on the opposite side, on the 4th track, on the north side of the south-bound track. It was standing about on South Capitol street, on the southeast side; he does not remember whether it was all the way over the crossing or not; he thought it was. It was just across from where Landrigan was lying, and was partially on the crossing; the gates were down; he first noticed the gates when he came down there after he had jumped off the end of the car; the gates were down then on both sides of the street. He did not notice the gates before 78 passed, because he had not been down that far; he stood on the southeast side of South Capitol street until 78 passed, and then started to run down the main track, and as he ran down the track he noticed that the gates were down on both sides.

Said witness, on cross-examination, further testified that when he reached Landrigan the latter was conscious to a certain stage; he asked Fenton who it was, and Fenton said it was "Tom Landrigan." When he got back where Landrigan was, Hottal, the yardmaster, Mr. Fenton, and Mr. Bright were there, and either Mr. Hottal or Mr. Bright asked Landrigan, "How did this thing happen?" and Landrigan said, "I came under the gates and something struck me, and a whole string of cars ran over me;" that was all witness heard him say. He did not hear him say anything about train No. 78; nothing more was said that he can remember; he saw Landrigan put in the ambulance which came up pretty soon

after the accident—about as soon as they could get there; the gates were raised when Landrigan was put in the ambulance. Said witness further testified that the lead or ladder track is used all the time, backwards and forwards, on week days especially, and very frequently on Sundays for putting cars in and pulling them out; that the light in the car was in the dome—in the vestibule—just on the outside of the door, over the platform; he knows there was a light in the west end of the car, the end going toward South Capitol street—which was the front end of the car the way it was moving; this light could be seen more plainly than a lamp; such lights contain two burners, are lighted by oil, and are more brilliant than a lantern; the reflector is over the top of the light; there is a kind of white shade over them. Said witness further testified that between the gate and the first rail of the track south of which Landrigan was found there was a clear space of about 14 or 15 feet; the tool-house set off from the gate about 17 ft., and Landrigan was nearer the tool-house than the gate; he was nearer the track than the gate, but inside of the gate. Said witness further testified that the runaway car passed the southwest crossing of South Capitol street before No. 78 reached there; it struck just the middle part of No. 78 as the train came by there; the runaway car had just about gotten across the crossing when the engine of No. 78 began to cross the crossing; it was almost at the same time.

Thereupon, upon redirect examination, said witness further testified that the light in the vestibule of the car could be seen by people on the ground; it hung down low and did not set right up in the dome; it had a shade over it, but he does not know whether you could call it a reflector or not; it was plain enough to be seen by anybody who was on the ground; that he did not remember stating at the coroner's inquest that "he would expect a coupling like that to give away—that it was an unsafe coupling. Said witness further testified that there were some cars standing on the end of the ladder track; that his track is a blind track down there—it stops right at the end of the property yard; it ran alongside of the property-yard fence and stopped on the southeast side of the F Street crossing."

Plaintiff introduced evidence tending to show that the south or ladder track, on or near which it was admitted on the trial by her counsel that her intestate went under the gate and must have stood, extended west about 200 feet from the crossing. One witness called it a "dead track," "because it does not lead anywhere, but just stops." That the part of this track as far as the South Capitol Street crossing was used chiefly for storing cars with supplies of coal and other things for the use of the railroad company, and was not used for making up trains. That no passenger cars were brought that far down and the moving of freight cars thereon was for the purpose of taking in and taking out those put there from time to time as aforesaid, some of which were generally standing there, as they were on the night of the accident. That the grade of the ladder track inclined to this western end, and gravity would carry down to it, a car that might break loose above. That cars standing on this

track would obstruct the view of trains coming from the depot on the inner or main tracks; the watchman's box and tower house also obstructed the view to the east, and one would have to leave the gate and get on or near the ladder track to see cars coming for some distance. That curves in the tracks also tended to prevent the observation of moving cars.

The testimony of another witness for the plaintiff is given in full as follows:

"FRANK C. KAPPEL testified that he was a brother of the plaintiff, Mrs. Landrigan; that in August, 1898, he was employed at the Penna. R. R. Company's round-house; that Landrigan was employed there as a machinist, and was on the night force; that between 12 and 1 o'clock they were allowed one hour for lunch, and Landrigan was in the habit of taking that hour off; Landrigan had been in the employ of the railroad company for about nine years in this same place and had been living on the north side of Virginia avenue ever since witness first knew him; the night Landrigan was killed was not a clear night nor was it a really dark night—there was no moon and there were a few clouds; that the most usual and direct route to Landrigan's house from the round-house was up South Capitol street to the southwest crossing, then right over to the north side of Virginia avenue; this was the way Landrigan usually took; the round-house was between H & I streets on South Capitol street, about 50 ft. from the building line of South Capitol street. Said witness further testified that he saw where Landrigan was picked up after he was hurt; he was a little west of the southwest crossing, in front of the tool-house; he saw blood around there and a little proud flesh right alongside the south track which is called the ladder track; this blood and flesh was on the south side of the ladder track; he saw it on the morning of the accident about half past four o'clock. Landrigan died at the Emergency hospital a little after four o'clock on the morning of the accident.

And thereupon said witness further testified that train No. 78 for New York was scheduled to leave the depot at 11.50 or 11.55.

That the place he noticed this blood, &c., was at the southwest crossing, a little west of the crossing; that the distance from the gates to the southernmost rail of the ladder track at that point is about 15 feet; that the portion of the ladder track lying west of the southeast crossing is used for storing gravel cars and unloading coal; when they unloaded it they shoved it down there alongside of the property yard of the railroad company and put it right over the fence; it was never used for shifting or for making up or breaking up trains or for storing passenger cars; the portion of this track east of the tower was used for shifting cars; this portion west of the tower was hardly used at all—just for storing a couple of cars down there; this tower and the yardmaster's office indicated on the map are the same; in August, 1898, when Landrigan was killed, witness was employed at the Penna. R. R. round-house, and had been so employed for about 6½ years, and was familiar with the use of those

tracks; on the night Landrigan was killed there were two cars, one containing gravel, west of the southwest crossing; with these two cars standing there on the west end of the ladder track a person could not see anything coming from the west if he were standing immediately outside of the south gate; the only way he could see would be by walking out on the track and looking up and down; that standing outside of the gate the flagman's box at the southwest corner of the southeast crossing and the tower beyond would obstruct the view of the ladder track looking east. Said witness further testified that in August, 1898, he was working in the daytime; that he had worked on the night force, but not during the year 1898; that he had occasion to cross the southwest crossing, at night, immediately prior to and about the time of Landrigan's death; that the gates as a general thing, in the night-time, were down; that during the summer of 1898, and for five or six years previously, he had passed over this crossing three or four times a week at all hours of the night up to 1 o'clock, and that after 11 o'clock he generally found the gates down whether trains were passing or approaching or not; after 11 o'clock the gates were generally kept down whether there was a train in sight or not. Said witness further testified that there was an electric light on the north side of the southeast crossing, about 200 ft. from where Landrigan was killed; he had never noticed whether this electric light furnished any light of any consequence at the intersection of South Capitol street S. W.; that if a train were standing on the north track a few feet from the southwest crossing it would have the effect of making it darker at the gates at the southwest crossing. And thereupon said witness further testified that the ladder track west of the southeast crossing is always rusty, and the track that is used for shifting purposes is always bright.

And thereupon said witness, over the objection of counsel for the defendant, was permitted to testify that he and Landrigan used to go home together for two or three months; that they both worked at night at the time; that the gates were down and that they had to crawl underneath the gates to get home; that the gates were generally kept down and they very seldom ever saw the gates up; that the times when Landrigan and the witness crossed were between 12 and 1 o'clock at night and between 6 and 7 o'clock in the morning.

And thereupon said witness, on cross-examination, testified that he had been in the employ of the railroad company for between six and seven years prior to March 1900, excepting a period of about three months, about three years before Landrigan's death; that he "notices" the rust upon the south track pretty nearly every time he passes there; that he noticed it "this morning;" there are four rails there that are bright, two are rusty, and two others are not so rusty; he has noticed this condition ever since he has been crossing there for the last twenty years; this rust was west of the southwest crossing; he did not remember testifying at the former trial about there being rust on the tracks, because he was not asked the question; counsel asked him about the rust "this morning" for the first

time; the south track is pretty well rusted—is rusty all the time; he knows two tracks are bright, and the track fartherest north is not as bright as the middle tracks; that he did not know whether or not the center tracks have steel rails and the north and south tracks iron rails, but did know there was a difference in their weight, the rails of the middle or main tracks being heavier; these tracks are more constantly run over and this tends to keep them bright. Said witness further testified that his mother lived north of the tracks, and that he visited her sometimes two or three times a week after he moved south of the tracks; when Landrigan was hurt witness was on the day shift; the time he worked on the night shift was for three or four months in the early stages of his employment by the company, and afterwards for three or four months when he returned to the service of the company and 2½ or 3 years before Landrigan's death; that when he crossed the tracks with Landrigan at night they were coming home to lunch between 12 and 1 o'clock. This was about 3 years prior to Landrigan's death; witness did not cross with him while witness was working in the daytime. Said witness further testified that the western end of the south track was used for storing cars and taking cars in and out for the purposes of the property yard; that he has seen these cars lie there two or three weeks after they were unloaded; that they might have taken the cars out immediately after pushing them in, but he did not see them taken out; the two cars that were on this track when Landrigan was killed had been there for two or three days; that he did not know whether or not these cars had been pulled out and put back during these two or three days, but he noticed the number of one of the cars, and the other car looked like the same car. Said witness further testified that he calls "shifting" moving cars from one track to another, and what they call a shifting track is generally used every day for shifting; that he has hundreds of times seen cars on that south track and knows they were put in and pulled out, but would not call the process of putting them in and pulling them out "shifting;" that when he testified at the former trial that the shifting is very general down there, he meant that they shifted cars down there to load and unload in the property yard; that this track has only an outlet to the east, but in this respect it is similar to every other track in the yard; the only way in differs from them is that it is about 8 or 10 hundred feet from any switch along there; on the east this track communicates with every other track in the yard by a switch, and, with the exception of the two main tracks, every other track in the yard has a blind end to it. Said witness further testified that during the year prior to Landrigan's death he crossed at this point, at night, after 11 o'clock, on an average of about once a week, or a little oftener; that he usually found the gates down whether trains were in sight or not; he has come there after 12 o'clock at night, when no trains were in sight, and found the gates up, but very seldom; he has found them up only when somebody hallooed to the man to raise them up; that after

the traffic of the day was over they would put the gates down and keep them down unless somebody asked to have them raised; this crossing at night is not used as much as in the daytime; most of the shifting and switching is done up towards the eastern section of South Capitol street; that every train that comes from the 9th Street freight station or 6th Street depot, going north, and every freight and passenger train coming from the north would have to cross the South Capitol Street crossing; that the shifting engines also cross there very frequently in the night-time; that engines from the round-house would come out on the ladder track, and then be shifted on the track upon which they were to operate, and all detached engines coming to or going from the round-house pass over the South Capitol Street crossing; that between 12 and 4 or 5 o'clock it is not very busy down there at this crossing. And thereupon said witness admitted having testified at the former trial that he "went around to see his mother once or twice a week, and when he passed going to work sometimes, the gates were up and sometimes down and there was no train in sight;" that he always found the gateman there when he was passing at night; when he got there at night and found the gates down he could not see whether there was a train in sight until he got out on the track and looked up and down; that he has found the gates down at night and walked out on the track and found a train or engines approaching or passing; that the watch-box south of the ladder track interfered with the view down that track to the east—the closer you get, the greater the obstruction from this box and the further away the more view you had of that track; that he thought, standing inside of the gates, the watch-box located outside of the gates and next to the fence south of the track would prevent a person seeing anything up that track; that you would have to get on the track before you could see up there on account of this watch-box, the fence, and the telegraph pole which were there; that west of the southwest crossing, towards F street, there is a curve; that you could not see around that curve until you got on the north side of the crossing; that although you could not see a train coming from that direction until you crossed the tracks you could hear it unless there were two or three trains passing at the same time, or an engine blowing off steam—then you could not hear anything; that he has crossed over at night and found the gates up and when no trains were coming, but people were passing under, halloaing to the watchman to raise the gates; that the gates were never hoisted all the way—they were on a slant.

And thereupon said witness, on redirect examination, testified that there was no shifting and making up or breaking up of trains on the southwest crossing, on the south track; that this was done east of that crossing, and the only trains that crossed there, freight or passenger, were trains that were already made up; that once in a while a passenger engine comes down from the Jersey yard on the north side of the crossing and switches off onto another track to get a car or something like that. Said witness further testified that

they would hoist the gates at night high enough for a man driving a buggy to go under them, and then lower them again; that this south track from the southeast crossing to its western extremity was rusty—you could see it was seldom used."

Plaintiff offered five other witnesses, who resided in the neighborhood and were familiar with the crossing. Their testimony tended to prove that the gates were generally down at night after ten or eleven o'clock until near day-light, whether trains were passing or not, and that passers in vehicles would frequently have to call up the gate keepers to raise the gates. Passers on foot would do the same or pass under the gates, which were bars merely that could be lowered and made to touch ends several feet above the ground.

Other evidence tended to show that a Pullman car, running about the speed of the car which is supposed to have struck the deceased, would make "practically no noise at all," and that the vestibule light therein is so located as to illuminate the platform only, which is its purpose. The light is not intended to illuminate the track and will not cast its reflection more than two feet beyond the bumper of the car, but one standing some distance away would see the reflected light on the platform.

No witnesses were introduced on behalf of the defendant.

1. Upon the evidence which has been recited, the court submitted the case to the jury, giving certain instructions asked by the plaintiff and denying all those asked on behalf of the defendant.

Exceptions were duly reserved to the grant and denial of these instructions, respectively, but it is not considered necessary to repeat them as they only present with elaboration the substantial propositions, founded on the insufficiency of the evidence, upon which the appellant relies.

2. Whether the deceased was run over by the Pullman car that broke loose and ran down the first or "ladder" track, or by the express train which passed on the adjoining track, near about the same time, was unquestionably for the ascertainment of the jury.

There was no direct evidence showing upon which of these two tracks the accident occurred, but many circumstances established by the evidence indicated that the deceased was struck by the Pullman car whilst on or near the "ladder" track. And it cannot be assumed that these were completely refuted by the declaration of the stricken and suffering man, that he had been run over by "a whole string of cars."

3. Whether, if the deceased was run over by the Pullman car whilst on or near the ladder track, it was negligence on the part of the defendant's employees to permit that car to escape and run down the track past the street crossing, was also properly submitted to the jury.

The testimony relating to the manner in which the Pullman car had been coupled to the next car ahead of it, as well as to the failure of the attempted operation of the brakes, came entirely from the employees upon whom the charge of negligence rests.

It has been recited in the statement of the facts of the case heretofore given as it appears in the bill of exceptions, and is so direct and plain, that its review would not make the question plainer. In our opinion, the least that can be said of this evidence, is, that reasonable men may fairly differ as to whether or not it disclosed negligence.

"It is only where the facts are such that reasonable men *must draw the same conclusion from them*, that the question of evidence is ever considered as one of law for the court." T. & P. R. Co. *v.* Gentry 163 U. S. 363, 366; Cowen *v.* Merriman 17 App. D. C. 186, 202. See also Adams *v.* W. & G. R. R. Co. 9 App. D. C. 26, 31, and cases cited.

4. The chief reliance of the appellant is upon the contention, that the court erred in refusing to direct the jury to find for the defendant on the ground that the evidence showed, as matter of law, a plain case of contributory negligence on the part of plaintiff's intestate.

(1.) The exceptional conditions which make it the duty of the court to take from the jury the determination of the question, whether, in a particular case, negligence has been shown to exist, have been stated hereinabove with a citation of the supporting authorities. After a careful examination of the testimony, we are not satisfied that those conditions exist in the case at bar. What was said in one of the cases before cited is quite applicable to the facts now under consideration: "In this case it may well be contended that the proof of contributory negligence on the part of the deceased is strong, and many reasonable minds might be decidedly inclined to conclude from it that the deceased was guilty of contributory negligence in causing the accident. But the state of proof is such that we can not say that *all reasonable men* would so conclude. The court below thought that the evidence was not conclusive, and the jury concluded that the evidence was not sufficient to establish the fact that the deceased, by his own fault and want of caution, contributed to the production of the disaster." Cowen *v.* Merriman 17 App. D. C. pp. 202, 203.

(2.) In submitting the case in all its bearings to the jury, the court correctly charged them that what is proper care and caution can not be arbitrarily defined, but must depend upon the special circumstances and surroundings of the particular case. What may be ordinary care under one set of circumstances might be gross negligence under different surrounding conditions. Grand Trunk R'y Co. *v.* Ives 144 U. S. 408, 417.

(3.) As no witness saw the deceased immediately before he passed under the arm of the gate, or between that time and the receipt of the injury, and his only statement was that he had been run over by a whole string of cars, the jury had the right to presume that he had both looked and listened for approaching cars before stepping on, or dangerously near, the track, whichever he may have done.

The court did not err in so charging them with respect to this presumption, saying, at the same time, that it might be rebutted by facts and circumstances from which the contrary could reasonably

be inferred. T. & P. R'y Co. *v.* Gentry 163 U. S. 353, 367; Cowen *v.* Merriman 17 App. D. C. 186, 204.

The facts and circumstances relied on by the appellants to show that the deceased did not stop, look, and listen, are these, briefly stated: He saw and passed under the warning gate, and walked upon or across a track that was in common and frequent use for shifting cars. The car which struck him, came with no great speed down the track with a light in the dome of the vestibule. Hence it is argued that he would necessarily have seen and heard it had he stopped, looked and listened as a man of ordinary care should have done.

The fact that the deceased did not stop and remain at the gate has direct bearing on the general question of his contributory negligence and will be recurred to at a later stage.

It seems to have no important bearing on the particular fact whether deceased stopped, looked and listened for the approaching car or cars before reaching the adjacent track. It was not immediately at the track, and the evidence tended to show that approaching cars could not be seen from it for any distance. Moreover, deceased was familiar with the crossing and the gate gave him no notice of anything that he did not already know in respect of the number, proximity and use of the tracks.

On the other hand the evidence tended to show, that freight cars were occasionally stored on the ladder track east of the street crossing; that it was not regularly used at that point for making up trains; that passenger coaches were not run down that far; that a Pullman car running down the track in the manner described would make little or no noise; that the light in the vestibule dome was not a head-light, and that its reflection was cast upon the platform and not more than two feet beyond the car bumpers; the night was a dark one, and the electric lights not very near; moreover, the express train which must have passed about the same time added to the noises, and its smoke and that of an engine of a freight train which stood on the third track and nearly opposite the crossing, tended to increase the obscurity. Whether, from all these circumstances it was to be inferred that the deceased did not stop, look or listen, but walked recklessly to his death, was a question for the jury.

(4.) Without pausing to review the authorities cited on behalf of the appellants, it may be conceded that, where a gate is maintained at a crossing, and regularly lowered when trains are expected, and kept lowered until they shall have passed, and is then uniformly raised and kept raised when none are due or expected, it is a warning of danger to the public and sufficient, under all ordinary conditions, to justify the conclusion of contributory negligence, as a matter of law, on the part of one who undertakes to cross the tracks while the gate is down, and is run over by a passing train in so doing, See also R. R. Co. *v.* Carrington, 3 App. D. C. 101, 111, and cases cited.

But that is not the case presented by the evidence. The gate had not been uniformly lowered and raised for the purpose of warning

on the one hand, or of assurance on the other. The evidence tended to show that the gates were often lowered from ten to eleven o'clock at night and kept lowered until daylight the next morning, without regard to the passing of trains.

Passengers desiring to cross in vehicles were frequently compelled to call up a gateman to raise the gate. Persons on foot would do the same or else pass under the gate and then across the tracks.

This state of things had existed for some years during which the deceased was almost nightly engaged in crossing the track at that point in going to and fro between the machine shop and his home.

Under this evidence, we do not agree with the contention that all reasonable minds must necessarily come to the one conclusion that deceased was guilty of contributory negligence in passing under the gate and attempting to cross the tracks, without any other act of negligence. Finding the gate closed under these circumstances, the deceased was not bound in law to take it as a warning of immediate danger, and to stop and wait and call for information to an unseen gateman. If in fact there was a gateman within sight or hearing at the time, there is nothing in the evidence from which it could be inferred. That the evidence does not show that the gate was invariably kept down each night between eleven o'clock and day light we regard as immaterial so far as the question of law is concerned. The constancy or variableness of the practice was a question merely, of more or less weight, according to the facts and circumstances, for the consideration of the jury. And the court did not err in submitting the whole question to them, as was done, under a full, fair and appropriate charge.

The judgment will be affirmed with costs; and it is so ordered. *Affirmed.*

TUESDAY, *May 13th, A. D.* 1902.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY and The Philadelphia, Wilmington and Baltimore Railroad Company, Appellants,
vs.
CATHARINE LANDRIGAN, Administratrix of the Estate of Thomas J. Landrigan, Deceased.
No. 1168, April Term, 1902.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court, in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE SHEPARD.

May 13, 1902.

TUESDAY, *May 20th, A. D.* 1902.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY and The Philadelphia, Wilmington and Baltimore Railroad Company, Appellants,
vs.
CATHARINE LANDRIGAN, Administratrix of the Estate of Thomas J. Landrigan, Deceased. } No. 1168.

On motion of Mr. J. S. Flannery of counsel for the appellants, it is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond to act as supersedeas is fixed at the sum of ten thousand dollars.

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between The Baltimore & Potomac Railroad Company, and The Philadelphia, Wilmington & Baltimore Railroad Company, appellants and Catharine Landrigan, administratrix of the estate of Thomas J. Landrigan, deceased, appellee, a manifest error hath happened, to the great damage of the said appellants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of May, in the year of our Lord one thousand nine hundred and two.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Know all men by these presents, that we, The Philadelphia, Wilmington & Baltimore Railroad Company and The Baltimore & Potomac Railroad Company, as principals, and The American Surety Company of New York, as surety, are held and firmly bound unto Catherine Landrigan, administratrix of Thomas J. Landrigan, de-

ceased, in the full and just sum of ten thousand ($10,000) dollars to be paid to the said Catherine Landrigan, administratrix of Thomas J. Landrigan, deceased, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of May in the year of our Lord one thousand nine hundred and two.

Whereas, lately at the April term, 1902, of the Court of Appeals of the District of Columbia, in a suit depending in said court between The Philadelphia, Wilmington & Baltimore Railroad Company and The Baltimore & Potomac Railroad Company, appellants, *vs.* Catherine Landrigan, administratrix of Thomas J. Landrigan, deceased, appellee, a judgment was rendered against the said The Philadelphia, Wilmington & Baltimore Railroad Company and The Baltimore & Potomac Railroad Company, appellants, and the said The Philadelphia, Wilmington & Baltimore Railroad Company and The Baltimore & Potomac Railroad Company, appellants, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse said judgment in the aforesaid suit, and a citation directed to the said Catherine Landrigan, administratrix of Thomas J. Landrigan, deceased, citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next.

Now, the condition of the above obligation is such, that if the said The Philadelphia, Wilmington & Baltimore Railroad Company and The Baltimore & Potomac Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THE PHILADELPHIA, WILMINGTON & BALTIMORE RAILROAD COMPANY,
By F. D. McKENNEY, [SEAL.]
Its Attorney in Fact.
THE BALTIMORE & POTOMAC RAILROAD COMPANY,
By F. D. McKENNEY, [SEAL.]
Its Attorney in Fact.

[Seal of the American Surety Company.]

THE AMERICAN SURETY COMPANY OF NEW YORK,
By JNO. S. LOUD, *Resident Vice-President.*

Attest: LEONARD DAMMANN,
Resident Ass't Secretary.

Sealed and delivered in the presence of—
J. S. FLANNERY.
L. BERT NYE.

Approved by—
R. H. ALVEY,
Chief Justice.

O. K.
J. J. DARLINGTON,
CHAS. A. DOUGLASS,
J. D. WRIGHT,
(By C. A. D.)
Attorneys for Appellees.

Washington agency No. 323.

(Endorsed:) No. 1168. Catherine Landrigan, administratrix of estate of Thomas J. Landrigan, deceased, *vs.* The Philadelphia, Wilmington & Baltimore Railroad Company and The Baltimore & Potomac Railroad Company. Bond on writ of error to the Supreme Court of the United States. Court of Appeals, District of Columbia. Filed May 29, 1902. Robert Willett, clerk.

UNITED STATES OF AMERICA, *ss:*

To Catharine Landrigan, administratrix of the estate of Thomas J. Landrigan, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The Baltimore and Potomac Railroad Company and The Philadelphia, Wilmington and Baltimore Railroad Company are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 29th day of May, in the year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted May 29th, 1902.

J. J. DARLINGTON,
CHAS. A. DOUGLASS,
J. D. WRIGHT,
Attorneys for Catharine Landrigan, Adm'tx.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 29 1902 Robert Willett, clerk.

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 73, inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The Baltimore and Potomac Railroad Company and The Philadelphia, Wilmington and Baltimore Railroad Company, appellants *vs.* Catharine Landrigan, administratrix of the estate of Thomas J. Landrigan, deceased, No. 1168, April term, 1902, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 31st day of May A. D. 1902.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,583. District of Columbia Court of Appeals. Term No. 71. The Baltimore & Potomac Railroad Company and The Philadelphia, Wilmington & Baltimore Railroad Company, plaintiffs in error, *vs.* Catharine Landrigan, administratrix of the estate of Thomas J. Landrigan, deceased. Filed June 12th, 1902.